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CHICAGO, ILLINOIS 60607-7090

TEL: 773/936-3200 FAX: 773/936-4700

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PRINTED IN THE UNITED STATES OF AMERICA

10 9 8 7 6 5 4 3 2 1

ISBN 0-226-17111-1

HARDCOVER \$45.00

PAPERBACK \$25.00

9 780226171111 >

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NEW YORK
JAN 17 1891

THE
REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES
IN THE
ENGLISH COURTS OF COMMON LAW AND EQUITY,
FROM THE YEAR 1785,
AS ARE STILL OF PRACTICAL UTILITY

EDITED BY

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ASSISTED BY

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OF LINCOLN'S INN, ESQ. OF THE INNER TEMPLE, ESQ.
BARRISTERS-AT-LAW.

VOL. XLIII.

1835-1837.

1 MOORE, P. C.—1 MYLNE & CRAIG—4 ADOLPHUS & ELLIS—
6 NEVILE & MANNING—3 BINGHAM, N. C.—3 SCOTT—3
HODGES.

LONDON:

SWEET AND MAXWELL, LIMITED, 3, CHANCERY LANE.

BOSTON:

LITTLE, BROWN & CO.

1900.

BRADBURY, AGNEW, & CO. LD., PRINTERS,
LONDON AND TONBRIDGE.

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NEW YORK

PREFACE TO VOLUME XLIII.

Several cases of notable and various interest will be found in the present volume. *Mayor of Lyons v. East India Co.*, p. 27, is long in proportion to any utility it is likely to have for the practical business of most readers. But it is of such importance for the constitutional law and history of British India that we feel bound to preserve it with only slight retrenchment of details. *Roux v. Salvador*, p. 638, is a leading case in the law of marine insurance, and *R. v. Greenhill*, p. 440, on the nature and grounds of a father's rights as natural guardian of his children. This was a case much honoured by the late Mr. Justice Willes. *Vaughan v. Menlove*, p. 711, finally settled the rule of what Chief Justice Holmes of Massachusetts has aptly called "the external standard"—that due care and caution do not consist in acting to the best of one's own judgment, but in acting with not less judgment than a man of ordinary sense and prudence may be expected to shew. The reasonable man of the law is a man of fair average understanding as well as good intentions. *Malachy v. Soper*, p. 691, is an early and instructive example in the line of authorities which have now distinguished slander of title, as an action in the nature of deceit, from defamation. Recent development of actions for fraudulent imitation of trade names and "unfair competition" generally has increased the importance of those authorities, if anything. As to defamation

proper, we have before now had occasion to remark on the late dates at which various points came to be clearly settled. *Lay v. Lawson*, p. 487, shews a good deal of vagueness existing in 1836 about the differences, now elementary, between the defences of justification, privilege, and fair comment.

Trower v. Chadwick, p. 659, *Chadwick v. Trower*, in Ex. Ch., p. 676, are not free from difficulty as to the total result of the two judgments. The judgment of the Common Pleas on the first count of the declaration was left, in form, untouched by the disallowance of the second count in the Exchequer Chamber. But the reasoning of the Exchequer Chamber seems to shew that the first count, though probably sufficient, was inartificially framed so far as it introduced the question of the defendant's acts being done with precaution or otherwise. If the plaintiffs had a right of support for their building at all, it was an absolute right with which the defendant interfered at his peril. It seems to have been formerly the practice to allege negligence in actions of this kind, but it is sufficient to refer to *Dalton v. Angus*, 6 App. Ca. 740, to see that this was founded on a misconception of the nature of the right claimed.

In *Squire v. Campbell*, at p. 248, it will be seen that Lord Cottenham thought the statue of King George III. in Cockspur Street a great benefit to the public. It is open to consideration whether this was more than an extra-judicial opinion. There is a rather hard passage in Mr. G. Meredith's "One of our Conquerors," from which it may be inferred that he does not agree with Lord Cottenham.

Some persons think the reporters of the present day are less accurate than their predecessors. Our impression is that this is by no means generally true. For our part we

think no modern reporter, and we hope no modern editor of reports, would confound Jane Seymour with Lady Jane Grey: see p. 126. But at p. 555 may be seen the beginning of a series of learned notes—those of the late Serjeant Manning—which very few modern lawyers can hope to rival.

We have received a complaint as to the omission from the Revised Reports of *Thorpe v. Eyre* (1834) 1 A. & E 926. The complaint is founded on the fact that the case is cited in Woodfall's Landlord and Tenant, 16th ed. p. 801, in these terms: "Where a tenant held from Lady-day, and there was a custom that the tenant, at the regular expiration of the Lady-day tenancy, should have the away-going crops, and the tenancy was determined on the 1st of June by an award made in a reference of disputes between the landlord and tenant; it was held that the custom had no operation." At p. 938 of the report the judgment of the Court says: "We think the custom had no operation in the case of a tenancy so determined." But it appears by reference to the argument, and especially to the remarks of Taunton, J. at p. 933, that this was not a general proposition of law, but merely an interpretation of the arbitrator's intention in making an award which dealt with all matters in difference and said nothing about emblements. The citation in Woodfall, therefore, seems to go beyond what the decision warrants. We should have thought the point rather minute in any view. The rest of the decision is of no importance at the present day, nor does our correspondent allege that it is. It appears to us on the whole, with all respect for Woodfall's succession of learned editors, that the fault, if any, is with some or one of them and not with us. No judicial reference of any kind to the case, during the sixty-five years that

have elapsed since it was decided, has been found by the ordinary means of search; we mention this because our correspondent called it a leading case. It has already been explained sundry times that we do not undertake to reprint every case that is still cited in a current text-book and has not been expressly overruled; still less, we may add, to give our reasons for every omission of any such case. If we proceeded on that plan, there would be little chance of the Revised Reports being completed within the twentieth century. The persistence of an old case in an old text-book which has not been thoroughly recast for many years is, taken by itself, the very lowest degree of evidence that the case is likely to be of any real use at the present day.

F. P.



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OF THE

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			<i>Vice-Chancellor.</i>

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NOTE.

The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.



The Revised Reports.

VOL. XLIII.

BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY (1).

MARY ANN TONGUE *v.* EDWARD TONGUE (2).

(1 Moore, P. C. 90—98.)

A marriage by banns, in the publication of which one of the Christian names of the man, a minor, was designedly concealed, and which was solemnized in the name so falsified; held void under the stat. 4 Geo. IV. c. 76, ss. 7, 22, the Judicial Committee being of opinion that the circumstance of the man omitting to sign his full Christian names in the register, indicated his participation in the previous false publication.

EDWARD CROXALL TONGUE, being a minor of the age of 17 years, and Mary Ann Allen, a widow of the age of 35 years, were married by banns in the parish church of St. Michael, Bristol, on the 26th February, 1833. The banns were published on the three preceding Sundays, in the names of Edward Tongue, bachelor, and Mary Ann Allen, spinster, and the marriage was registered in the following form:

(1) Present: the Vice-Chancellor, Mr. Baron Parke, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy.

(2) Cited in the judgment of the Court, *R. v. Rea* (1872) L. R. 1

C. C. R. 365, 41 L. J. M. C. 92; and by Lord PENZANCE, *Templeton v. Tyree* (1872) L. R. 2 P. & D. 420, 422, 41 L. J. Mat. 86; dist. by BACON, V.-C., *Gompertz v. Kensit* (1872) L. R. 13 Eq. 369, 380, 41 L. J. Ch. 382.

1836.
June 21.

SHADWELL,
V.-C.
[90]

TONGUE Edward Tongue, of this parish, bachelor, and Mary Ann Allen,
 of this parish, spinster, were married in this church by banns,
 with consent of this twenty-sixth day of February,
 in the year one thousand eight hundred and thirty-three,
 By me, J. B. JEBB, Curate.

This marriage was solemnized between us,

In the presence of { EDWARD TONGUE.
 { SAMUEL QUINTON, { MARY ANN ALLEN.
 { SARAH HAYNES.

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The marriage was clandestine, and without the knowledge or consent of the parents of the minor, who *at the time was a pupil of Mr. William Cowan Atchison, the brother of Mrs. Allen.

Mrs. Allen resided with her brother, and acted as his house-keeper in the management of his affairs, and in such capacity attended to his pupils.

The minor was the eldest son of Edward Tongue, Esq., a gentleman possessed of considerable landed property: he was baptized by the names of Edward Croxall Tongue, and though known to some of the witnesses (two of whom were his school-fellows) by the name of Croxall Tongue, or Tongue only, had never been known by the name of Edward Tongue.

Sarah Haynes, the sexton of the parish church of St. Michael, one of the witnesses, who was present at the marriage, on her examination stated, that it was part of her business, after the clerk had entered the names and description, &c. of the parties whose banns were to be published in the banns-book, to file the paper from which he makes the entry, and put it away in the surplice-closet, in the vestry: the clerk makes the entry and she files the paper from which he makes it; he crosses the paper as entered, and then she puts it on the file, and she did so with the paper of notice for the marriage in question. She did not remember the publication of the banns in consequence of that notice particularly, but said she should not have been present at the marriage as she was, unless the banns had been regularly published and the parties out-asked: both the rector and the curate are very particular in examining the banns-book before a marriage takes place; they make the parties examine the

entry and see that their names are right, and their descriptions right; and if there is any mistake and a licence necessary, the rector makes the clerk pay for it, and *that makes the clerk very particular; and so she was sure that with respect to this marriage, where the parties were married as Edward Tongue, bachelor, and Mary Ann Allen, spinster, that the banns were regularly published on the three Sundays stated in the banns-book, and that they both of them before the ceremony was performed, inspected the entry in the banns-book, and acknowledged their names and descriptions as entered to be correct: of their ages she could say nothing, except that she remarked on going home to her daughter, that such boys as “Tongue” appeared to be, ought to be flogged instead of married, he appeared so young; and she had something occur in her own family, not long before, to make her say that, and remember it.

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It was not until the month of December, in the same year, that Mr. Tongue, the father, became acquainted with the circumstance of the marriage, and in the month of January following he instituted proceedings in the Consistory Court of London against Mary Ann Tongue, to annul the marriage on the ground of the minority of Edward Croxall Tongue, and the undue publication of banns.

On the 22nd July, Mary Ann Tongue was dismissed from the suit, by which the marriage was declared duly solemnized.

From this decision an appeal was interposed by Mr. Tongue to the Arches Court, and on the 7th May, 1835, the Judge (Sir HERBERT JENNER) pronounced for the appeal, resisting the sentence appealed from, and pronounced the pretended marriage between Edward Croxall Tongue and Mary Ann Allen null and void, pursuant to the statute 4 Geo. IV. c. 76, by reason that the said pretended marriage was had between them *knowingly and wilfully, without due publication of banns, and without a licence from any person or persons having authority to grant the same being first had and obtained (1).

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From this decree Mrs. Tongue now appealed.

(1) Reported in 1 Curtis, 38.

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The *King's Advocate* (*Sir John Dodson*), and *Platt*, K. C.
for the appellant:

The question depends on the true construction of the last Marriage Act, 4 Geo. IV. c. 76. The 22nd section enacts, "that if any persons shall knowingly and wilfully intermarry without due publication of banns or licence from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void." In order to avoid a marriage under this Act, the parties must knowingly and wilfully intermarry without due publication of banns: *Wiltshire v. Prince* (1); *Hadley v. Reynolds* (2). Both parties must be conversant of the fraud: *Rex v. Wroxtton* (3). It is therefore purely a question of fact to be determined upon the evidence in the case. There is no evidence that the husband procured the banns to be published in the name of Edward Tongue instead of Edward Croxall Tongue, or that he knew anything about the publication of the banns. The statement of Sarah Haynes that she has no doubt the banns-book was inspected at the time of the marriage, is mere belief from a general usage, and is at best only *her own conclusion; it is no evidence of the fact. The formal and legal description of the status of the parties is not requisite; the 7th section requires notice of the names and place and time of abode of the persons desiring the publication of banns, and does not insist on any formal description. The circumstance that Mrs. Allen, being a widow, described herself as a single woman, is therefore immaterial. The banns being in the name of Edward, the ceremony was of course performed in that name, and the person repeating after the clergyman would pronounce that name only which the minister did. Edward was the first, and, being a common name, must have been his most usual Christian name. The marriage is complete from the time it is pronounced

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(1) 3 Hagg. Rep. 332.

(2) 4 Hagg. Rep. [There is no such case in 4 Hagg. Ecc. Rep.]

(3) 38 R. R. 341 (4 B. & Ad. 640).

[Qu. whether "conversant" in the text immediately above should not be "conusant."]

so by the minister; the signature in the register is no part of the marriage, it is a subsequent and independent act.

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TONGUE.

The test to be applied is the same as in offences against the criminal law: there a guilty knowledge must be shewn. Upon an indictment for receiving stolen goods, or for uttering counterfeit coin, proof of the guilty knowledge must be shewn; it may be inferred from the conduct of the parties, but the evidence to warrant such inference must be irresistible. There is nothing here to warrant such conclusion. In an action upon a bill of exchange against an indorsee, notice of dishonour must be proved; suppose the witness should say, It is the custom of our house to give twenty-four hours' notice, and therefore I make no doubt such notice was given, could the acceptor recover? The inspection of the banns-book ought to be made out by direct evidence; it is mere surmise and conjecture.

Sir William Follett and Dr. Addams, for the respondent:

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To arrive at the true construction of the Marriage Act, the Act previously in force must be referred to. By 26 Geo. II. c. 33, s. 8, persons convicted of solemnizing matrimony without banns or licence were liable to be transported, and the marriage was null and void. Under that section it was held that if the banns were unduly published, the marriage was absolutely void. That alone annulled the marriage. It was to remedy that mischief that the statute 4 Geo. IV. c. 76, was passed, which by the twenty-second section provides that the marriage shall not be avoided unless the parties shall knowingly and wilfully intermarry without due publication of banns, &c. It is contended that under this statute both parties must knowingly and wilfully participate in the fraud. The object of the last statute was to correct the effect of the former one, by upholding a marriage where no fraud was intended. If the construction insisted on by the other side is to prevail, the statute will go further than the Legislature intended, and make a fraudulent marriage good.

The word "persons" in the twenty-second section does not imply parties; it is the nominative to the verb intermarry, and is used to make the sense complete. The seventh section,

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directing the delivery of notice for the publication of banns, treats such delivery as the act of both parties; the word "persons" is there used: yet it is not pretended that such delivery is requisite by both: the same construction must prevail in the twenty-second section. The case of *Rex v. Wroxtton* is no authority in point. It does not appear that either party was under age: the husband procured the pauper to be married in a false name, and the Court decided, *that for the purpose of a settlement the marriage was valid. Neither the parties themselves or their guardians sought to annul the marriage. The marriage here was in fraud of the rights of the father. One party must always be conusant of the fraud; and where two parties combine to carry a fraud into effect, the law presumes each equally guilty, and consequently each must be conusant of it. The onus of disproving such conclusion is on the other side. They have not examined the clerk who was a witness to the marriage, and could have deposed to the ignorance of the husband, if such existed. The witness Haynes speaks as to the custom of examining the banns-book; such examination must be presumed to have been made unless disproved on the other side; there is no ground to infer the contrary.

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All the authorities on the construction of the old statute are in *Rex v. Billinghamst* (1), and they shew that the alteration or omission of a Christian name in the publication of the banns rendered the marriage void where the intent of the parties was fraudulent. Such intent existed here; the marriage was without the consent or knowledge of the guardian of the minor; both parties were anxious for a clandestine marriage, and both conspired to obtain one; that is sufficient to presume both conusant of the fraud. The woman is confessed to have been aware of the fraud; the husband must have been *particeps criminis*. The banns are published in one only of his Christian names, Edward, he is married by that name only; he signs the register in that name alone; he knew it to be a partial, and therefore a false signature; and must have known the *previous circumstances

(1) 15 R. R. 474 (3 M. & S. 250— *Pougett v. Tomkyns*, 15 R. R. 480 259). See particularly the case of (3 M. & S. 262, n.).

which made that signature requisite. The concealment of his name being for the purpose of a fraud, the marriage is null and void.

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The *King's Advocate*, in reply.

THE VICE-CHANCELLOR :

Their Lordships think that the decree in the Court below must be affirmed; Mr. Baron PARKER thinks that stronger evidence of the knowledge of the parties to the fraud ought to have been obtained; but the rest of their Lordships feel satisfied with that which has been produced. We concur in the judgment in *Wiltshire v. Prince*, but consider this case dependent on its own circumstances. It appears that the marriage was clandestine, from the first step taken in it to its final solemnization; that it was concealed, and intended to be so. The woman is admitted to have been conusant of the fraud, and to have meditated and intended it. The minor is contended to have been ignorant of it. The note from which the banns were published misdescribed the husband, calling him Edward Tongue, his real name being Edward Croxall Tongue: the marriage was celebrated in the name of Edward only, and he signed the same name in the parish register: the entry is, Edward Tongue and Mary Ann Allen were married in this church by banns: it is therefore impossible for him not to have known of the publication of the banns; and the signature of only one of his Christian names shews that he must have known that the banns had been published in that name only. This signature was a fraud, and, coupled with the circumstance I have already alluded to, satisfies their Lordships that he, *with the woman Allen, knowingly and wilfully intermarried without due publication of banns: we therefore affirm the judgment of the Court below, but without costs.

[*98]

ON APPEAL FROM THE SUPREME COURT OF BENGAL (1).

JAMES YOUNG AND OTHERS *v.* THE BANK OF BENGAL (2).

(1 Moore, P. C. 150—174; S. C. 1 Deac. 622.)

1836.
Dec. 2, 16.
—
Lord
BROUGHAM.
[150]

Palmer & Co. having borrowed a large sum of the Bank of Bengal, deposited Company's paper with the Bank, to a greater amount, as a collateral security, accompanied with a written agreement, authorising the Bank, in default of repayment of the loan by a given day, "to sell the Company's paper for the reimbursement of the Bank, rendering to Palmer & Co. any surplus." Before default was made in the repayment of the loan, Palmer & Co. were declared insolvents, under the Indian Insolvent Act, 9 Geo. IV. c. 73 (3), by the 36th section of which it was declared, that where there had been mutual credit given by the insolvents and any other person, one debt or demand might be set off against the other, and that all such debts as might be proved under a commission of bankruptcy in England might be proved in the same manner under the Indian Insolvent Act. At the time of the adjudication of insolvency, the Bank were also holders of two promissory notes of Palmer & Co., which they had discounted for them, before the transaction of the loan and the agreement as to the deposit of the Company's paper. The time for repayment of the loan having expired, the Bank sold the Company's paper, the proceeds of which, after satisfying the principal and interest due on the loan, produced a considerable surplus. In an action by the assignees of Palmer & Co. against the Bank, to recover the amount of the surplus: Held, that the Bank could not set off the amount of the two promissory notes, and that the case did not come within the clause of mutual credit in the Bankrupt Act.

THIS was an appeal from a judgment given on the 26th March, 1833, in a cause in the Supreme Court of Judicature, at Fort William, in Bengal, in which the appellants were plaintiffs and the respondents defendants.

[*151] The appellants were the assignees of the estate and effects of John Palmer, George Alexander Prinsep, *William Prinsep and Charles Barber Palmer, lately trading in Calcutta, in the province of Bengal, in the East Indies, under the style and firm of Palmer & Co.; and they were duly appointed such assignees by virtue of an Act of Parliament made and passed in the 9th of Geo. IV. c. 73, entitled, "An Act for the Relief

(1) Present: Lord Brougham, the Vice-Chancellor, Mr. Baron Parke, Mr. Justice Bosanquet, Sir E. H. East, and Sir A. Johnston. *of India* (1868) L. R. 3 C. P. 444, 37 L. J. C. P. 221; foll. *Astley v. Gurney* (1869) L. R. 4 C. P. 714, 38 L. J. C. P. 357.

(2) *Dist. Naoroji v. Chartered Bank* (3) Rep. 11 & 12 Vict. c. 21, s. 1.

of Insolvent Debtors in the East Indies ;” and this was an action brought by the appellants, for the purpose of recovering from the defendants the sum of sicca rupees 90,176, 10a. 1p. and interest. The plaintiff was a special declaration in *assumpsit* containing special counts on the several agreements hereafter mentioned, with counts for money lent and advanced, money had and received for interest and upon an account stated. The defendants pleaded the general issue, *non assumpsit*, and gave notice of set-off.

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The cause came on to be tried on the 21st July, 1832, upon certain written admissions entered into on both sides, when by consent a verdict was entered for the appellants, the plaintiffs, for sicca rupees 80,000, subject to the opinion of the Supreme Court on the following case :

The insolvents above named were, in the month of November, 1829, the members and partners of the firm of Palmer & Co., of Calcutta, merchants and agents, and in the habit of taking up, for the purposes of their said firm, loans from the said defendants, in their corporate capacity, as well on deposit of promissory notes of the Government of Bengal, commonly called Company’s Paper, as upon discount of their own and other negotiable securities.

Previously to the adjudication of insolvency, and on the 12th day of November, 1829, the said firm of Messrs. Palmer & Co., in the course of business, borrowed *from the said defendants the sum of sicca rupees 103,900 ; as a security for which they deposited and delivered to the said defendants several Government promissory notes for different sums, amounting in all to sicca rupees 113,000, and on the same date made and delivered to the said defendants an agreement in writing, in the words and figures following :

[*152]

“ BANK OF BENGAL, the 12th of Nov. 1829.

“ Three months after date we, Palmer & Co., promise to pay to J. A. Dorin, esquire, treasurer of the Bank of Bengal, on account of the said Bank, the sum of sicca rupees 103,900, with interest thereon at the rate of 5 per centum per annum, for which said principal sum and interest at the rate aforesaid, we have deposited in the said Bank as collateral security, Company’s paper, to the amount of sicca rupees 113,000, and

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in default of payment at the period above mentioned, we hereby authorize the treasurer of the said Bank for the time being, absolutely to sell or dispose of the said Company's paper for the reimbursement to the said Bank, on or after the expiration of the said period, by public or private sale, the said treasurer rendering to us any surplus which may be forthcoming from such sale; and we being bound to make good to him whatever deficiency there may be, below the amount of the said principal sum and interest, and the sale price of the said Company's paper to be made on the price, to be calculated at the premium or discount of the Company's paper on the day on which the said Company's paper shall be sold; but if the said treasurer shall not proceed to sell or dispose of the said Company's paper at such periods, we, the said Palmer & Co., shall and will pay and

[*153] *allow unto the said Bank of Bengal interest at and after the rate of 12 $\frac{1}{2}$ per annum on the said sum, up to the day on which the said sum shall be paid off and liquidated, or up to the day on which the said treasurer of the said Bank of Bengal shall, in pursuance of the power hereinbefore contained, sell and dispose of the said paper so deposited as aforesaid, as the case may happen.

“PALMER & Co.”

In the same month of November, 1829, the firm, in like manner, took up from the said defendants five other loans on the like terms; that is to say, on the 17th of November, a loan of sicca rupees 47,800, on deposit and delivery of like Government promissory notes to amount of sicca rupees 53,800; on the same 17th day of November, a further loan of sicca rupees 175,000, on deposit and delivery of like Government notes to amount of sicca rupees 190,400; on the 18th day of November, a loan of sicca rupees 29,400, on deposit and delivery of like Government notes to amount of sicca rupees 32,000; on the 20th day of November, a loan of sicca rupees 20,300, on deposit and delivery of like Government notes to amount of sicca rupees 22,100; and on the 25th day of November, a loan of sicca rupees 41,000, on deposit and delivery of like Government notes to amount of sicca rupees 44,600; on all which several occasions

they signed and delivered written agreements, similar in form and purport to that of the 12th day of November, 1829, above set forth.

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On the 4th day of January, 1830, and whilst the said several deposits were still in the hands of the said defendants, and the said six several agreements outstanding *and unsatisfied, the said John Palmer, George Alexander Prinsep, William Prinsep and Charles Barber Palmer, the partners in the said firm of Palmer & Co., filed their joint petition of insolvency in the Court for the Relief of Insolvent Debtors at Calcutta, pursuant to the provisions of the Act of Parliament passed in the ninth year of the reign of his said late Majesty King George the Fourth, intituled, "An Act to provide for the Relief of Insolvent Debtors in the East Indies, until the said 1st day of March, 1833;" and were thereupon, on the same day, duly adjudged and declared insolvent; and the whole estate and effects of the said partnership firm were duly assigned to the common assignee, and were, at the time of the commencement of this action, duly vested in the said plaintiffs, as assignees of the said insolvent firm.

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At the time of the said adjudication of insolvency, the defendants were also holders and indorsees of two several promissory notes, made by the said firm of Palmer & Co.; that is to say, one promissory note of the said firm, bearing date the 21st day of October, 1829, whereby the said firm of Palmer & Co., three months after date, promised to pay to Baboo Ruggooram Ghossain, or order, the sum of sicca rupees 40,000, for value received; and one other promissory note, bearing date the 4th day of November, 1829, whereby the said firm of Palmer & Co., three months after date, promised to pay to the said Baboo Ruggooram Ghossain, or order, the sum of sicca rupees 60,000, for value received; which last-mentioned promissory notes, duly indorsed by the said payee respectively, had been discounted respectively by the said defendants, in the ordinary course of business, before the said insolvency; and on the dates thereof *respectively, and the amount thereof respectively, after deducting discount, paid by the said defendants to the said firm; and that both of the said last-mentioned

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promissory notes, at the time of action brought, were, and are still, wholly unpaid in the hands of the said defendants, as indorsees and holders thereof respectively.

After the said adjudication of insolvency, the time expressed in the said agreement of the said 12th day of November, 1829, for payment of the said loan of that day, having expired, and no payment or tender of payment having been made thereof, the said defendants, on the 15th day of February, 1830, sold and disposed of the said several Government promissory notes, or Company's paper, to amount of sicca rupees 113,000, so deposited and delivered by way of security as hereinbefore mentioned, at the price or bazaar rate of the day; and after retaining and satisfying themselves, in full, out of the proceeds of sale, the principal and interest of the said loan, in the said agreement in writing of the said 12th day of November mentioned, with interest, and of the stamp duty thereon advanced by the said defendants, there remained a surplus arising from the said sale of sicca rupees 6,778, 1*a.* 4*p.* in the hands of the said defendants.

Like default having afterwards been made in the payment, or tender of payment, of the said five other loans made on like deposit and delivery of Company's paper as aforesaid, on the days expressed for payment thereof respectively in the said five other like agreements in writing, the said defendants sold and disposed of the whole of the Company's paper deposited and delivered as security for the said five loans respectively; and upon such last-mentioned sale there *accrued a further surplus, after payment of the said loans, and interest and stamp-duty thereon respectively, amounting, in the whole, to sicca rupees 23,898, 8*a.* 9*p.*, making, with the said surplus on the said prior sale, the total sum of sicca rupees 30,176, 10*a.* 1*p.*, which is the amount sought to be recovered by the plaintiffs in this action, together with interest, at the rate of six per centum, from the respective dates of sale, if the said Court shall allow the same.

At the time of the said sales respectively, the said two several promissory notes, so indorsed and discounted as aforesaid, had respectively fallen due, and were in the hands of the said defendants wholly unpaid. The defendants claim to set off the

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amount due on the said two discounted promissory notes respectively, against the said demand of the plaintiffs' assignees as aforesaid.

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If this Honourable Court should be of opinion that the defendants are entitled to such set-off, the said verdict is to be set aside, and a verdict entered for the defendants. If, on the contrary, the Court should be of opinion that they are not so entitled, the verdict to stand for the plaintiffs for sicca rupees 30,176, 10a. 1p. together with interest at the rate and from the dates above mentioned, if allowed. The special case above stated came on to be argued in the said Supreme Court on 25th of March, 1883, before the Honourable Sir John Franks, acting Chief Justice, and the Honourable Sir Edward Ryan, Justice, and was adjourned to the following day, when the Court gave judgment for the defendants in the said action, and set aside the verdict formerly entered for the plaintiffs.

The plaintiffs having entered into the usual recognizances *in the Supreme Court, obtained leave to appeal, and thereupon presented their petition of appeal to his Majesty in Council, praying that the judgment might be reversed, and that the verdict entered for the plaintiffs might be ordered to stand for the sum of sicca rupees 30,176, 10a. 1p. and interest, after the rate and from the date mentioned in the special case, for the following

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Reasons :

1st. Because, by the assignment made by the insolvents in pursuance of the Act of the 9 Geo. IV. c. 72, the whole interest which the insolvents then had in the Company's paper and Government securities deposited with the respondents, and the right to redeem the same, became vested in the assignees, in trust for all the creditors of the insolvents, and the interest and right so vested in them could not be defeated by any subsequent default of the insolvents, so as to give the respondents a right of set-off, which they did not possess at the date of the assignment.

2nd. Because the Company's paper and Government securities in question were deposited with the respondents

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under express contracts that the same should be returned upon payment of the respective sums, to secure which they were respectively deposited; and

The respondents, on the other hand, contended that the judgments ought to be affirmed, for the following

Reasons:

[*158]

1st. Because the Act of 9 Geo. IV. c. 73, for the Relief of Insolvent Debtors in the East Indies, provides, *by section 36, that where there has been a mutual credit given by the insolvents and any other person or persons, one debt or demand may be set off against the other; and all such debts, deeds and claims as may be proved under a commission of bankruptcy, according to the provisions of the English Bankrupt Act, may be proved under the Indian Insolvent Act, in the same manner, and subject to the like deductions, conditions and provisions, as prescribed in the English Bankrupt Act.

2nd. Because the contracts stated in the declaration, by which the Bank of Bengal agreed to pay to the insolvents the surplus remaining after the sale of the Government paper, beyond the amount of the loans which it was given to secure, were a credit given by the insolvents to the Bank to the amount of such surplus; and the promissory notes held by the Bank were a credit to the amount of such notes given by the Bank to the insolvents, thus constituting a mutual credit, and therefore a subject of set off between the Bank and the insolvents. The assignees therefore, by tendering the amount of such respective sums before default had been made, might have recovered the said Company's paper and Government securities in specie, by an action of trover, to which no set off, or other defence could have been made; and although default was afterwards made in payment of the loans, and the securities were sold before any tender made, yet the surplus monies arising from such respective sales were monies had and received for the use of Palmer & Co.

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3rd. Because no claim of him upon such surplus monies can be set up by the respondents in opposition *to their

express contract to render such surplus monies to Palmer & Co.; especially having regard to the fact, that the five several agreements, made subsequently to the first agreement of the 12th November, 1829, do not stipulate either that any surplus upon the former deposits should be a security against any deficiency in the produce of the subsequent deposits, or that any surplus upon the subsequent deposits should be a security against any deficiency in the produce of the former deposits (1).

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Sir W. Follett and Mr. Deacon (with whom was *Mr. S. Pepys Cockerell*), for the appellants :

Relied upon the grounds stated in the Reasons of the appellants' case, and cited the following authorities: *Anon.*, 1 Mod. 215; *Chapman v. Derby*, 2 Vern. 117; *Hewison v. Guthrie*, 42 R. R. 720 (2 Bing. N. C. 755); *Ex parte Deeze*, 1 Atk. 228; *Ex parte Ockenden*, 1 Atk. 235; *Green v. Farmer*, 4 Burr. 2214; *Ex parte Prescott*, 1 Atk. 230; *Collins v. Jones*, 34 R. R. 572 (10 B. & C. 777); *Hankey v. Smith*, 3 T. R. 507; *Ex parte Hale*, 3 Ves. 304; *Gibson v. Bell*, 41 R. R. 660 (1 Bing. N. C. 743); *Olive v. Smith*, *5 Taunt. 56; *Rose v. Hart*, 20 R. R. 538 (8 Taunt. 499); *French v. Fenn*, 1 Cook, B. L. 536, 7 ed., 3 Doug. 287; *Smith v. Hodson*, 4 T. R. 211; *Parker v. Carter*, 1 Cook, B. L. 548; *Sampson v. Burton*, 2 Brod. & B. 89; *Easum v. Cato*, 24 R. R. 594 (5 B. & Ald. 861); *Rose v. Sims*, 1 B. & Ad. 521; *Clarke v. Fell*, 4 B. & Ad. 404; *Key v. Flint*, 8 Taunt. 21; *Ex parte Flint*, 18 R. R. 12 (1 Swanst. 30); *Buchanan v. Findlay*, 9 B. & C. 738; *Mountford v. Scott*, 24 R. R. 55 (T. & R. 274); *Ex parte Whitbread*, 19 Ves. 209; *Ex parte Marsh*, 2 Rose, 239; *Ex parte Alexander*, 26 R. R. 207 (1 Gl. & J. 409); *Ex parte Hannen*, 1 Deac. & C. 407.

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The *Attorney-General* (*Sir John Campbell*) and *Mr. Maule*, K. C., for the respondents :

Commented on the cases above, and insisted that it was a question of mutual credit; they also cited *M^cGillivray v. Simpson*, 9 Dowl. & Ry. 35; 9 B. & C. 746, note (a).

(1) *Ex parte Ockenden*, 1 Atk. 235; *Green v. Farmer*, 4 Burr. 2214.

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This was an appeal from the judgment of the Supreme Court of Calcutta, in an action brought by the assignees of Palmer & Co. against the Bank of Bengal, in which a verdict had been taken by consent, subject to the opinion of the Court on a special case.

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The case stated that Palmer & Co. had been in the habit of obtaining loans from the Bank on the deposit of the Company's negotiable paper, as well as on the discount of their own and other securities: that in the month of November, 1829, Palmer & Co. obtained in this way six several loans from the Bank, amounting in the whole to 417,000 sicca rupees, depositing Company's paper to the amount of 460,000 sicca rupees, *and giving their own promissory notes at three months' date for the sums thus advanced by the Bank. By these six several promissory notes Palmer & Co. engaged to pay the several sums advanced with interest, and each note contained a further statement, that so much Company's paper had been deposited as collateral security, with an authority to the Bank to sell the paper deposited for the reimbursement of the Bank at the expiration of the three months' credit, rendering to Palmer & Co. any surplus arising from such sale, and with an undertaking of Palmer & Co. to make good any deficiency, and to pay 12 per cent. interest from the expiration of the credit until the debt should be discharged, or the paper be sold. The several credits expired in February, 1830: the first on the 15th of that month, the last on the 28th; and on the 4th of January, while the whole of the loans remained unpaid, and the whole of the deposits were in the hands of the Bank unsold, Palmer & Co. were adjudged insolvent under the 9 Geo. IV. c. 73, and the plaintiffs were appointed assignees of their estate and effects; at the same period, the 4th of January, the Bank held promissory notes of Palmer & Co. at three months' date, for 40,000 and 60,000 sicca rupees, payable, the former the 24th January, and latter the 7th February, 1830. These notes the Bank held as indorsees for value, Palmer & Co. having discounted them with the Bank in the ordinary course of business, and before the first of the six loans, viz. on the 21st of October, and the 4th of November, 1829.

None of the loans being paid by the insolvents or their assignees, the Bank proceeded to sell the paper deposited according to the terms of the assignments, and there remained a surplus upon the six sales of *90,176r. 10a. 8p., after paying off the several loans with the interest stipulated. For this sum, with interest at six per cent. after the dates of the several sales, the action was brought. The Bank sought to set off the sum due upon the two promissory notes, which they held as indorsees for value, and which remained unpaid, against this surplus of the deposits made upon the subsequent loans; and the Court, on the case reserved, being of opinion that this set off was competent to the Bank, gave judgment for the defendants, which was entered up the 29th of August, 1883, and is now brought before this Court by appeal. The Act under which the proceedings were had upon Palmer & Co.'s insolvency (9 Geo. IV. c. 73) contains a provision (s. 36) similar to the 56th section of the English Act, 6 Geo. IV. c. 16, touching mutual debts and credits; and although there are some words of the latter omitted, particularly those respecting "mutual debts between the parties," and those requiring the commissioners "to state the account between them," yet, as there is a very general declaration that "all such debts due and claims as may be proved under a commission of bankruptcy, according to the Act of 6 Geo. IV., may also be proved in a proceeding under this Act, in the same manner and subject to the like deductions, conditions and provisions as in 6 Geo. IV. are set forth and prescribed," it is manifest that the proceedings are entirely assimilated; that the difference in the preceding portion of the section is immaterial, and that the present question is to be dealt with, and disposed of exactly as if it had arisen in a proceeding of bankruptcy under the English Act.

It is equally clear that in this case the question turns upon the right of set off given by the statute, *which extended the set off recognised by the common law (*Anon.*, 1 Mod. 215; *Peters v. Soame*, 2 Vern. 428). But for that extension, it never could be contended that the Bank had a lien upon the securities deposited beyond the amount of the money advanced upon the credit of those securities, since, even in the most

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favourable view that could be taken, that of the Bank being Palmer & Co.'s bankers, the lien for the general balance of the customer's account would in this case be restricted by the circumstances in which the deposit was made. This is clearly admitted in *Davis v. Bowsher*, 2 R. R. 650 (5 T. R. 488), where the general lien of bankers was perhaps first distinctly ascertained. Nor can it be said that the debt due by Palmer & Co. on the promissory notes discounted had any connexion with their deposit of the securities; for that debt was contracted before those securities were deposited, and the Bank could not have had them in contemplation when it discounted the notes.

The claim of the Bank is accordingly rested upon the 50th section of the Bankrupt Act, which is taken from the 28th section of the 5 Geo. II. c. 80, with such additions as were supposed necessary for enabling contingent debts to be set off, since these were by the new Act made proveable. Every debt or demand made proveable by the Act against the estate of the bankrupt may by this 50th section be set off "against such estate;" that is, against any debt or demand of the bankrupt's estate. But the former provision is retained, with the addition of the word "demand," taken from 46 Geo. III.; namely, that where mutual credit has been given by the bankrupt and any other person, or where there are mutual debts between the bankrupt and any other person, the commissioners *shall state the account between them, and one debt or demand may be set against another, and the balance only be claimed or paid on either side.

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The question then is, whether or not there were mutual credits or mutual debts between the parties to the transaction now under consideration. That there was both a debt from Palmer & Co. to the Bank, and a credit from the Bank to them, is undeniable. The Company were both previously indebted on their notes discounted, and by the money advanced on the deposits; but that is not enough, unless either the Bank was indebted to them or they had given the Bank credit. The only question then is, had Palmer & Co., or had they not, given the Bank credit before the bankruptcy within the meaning of the Act? in other words, was the deposit of the negotiable paper—

with the power to sell and pay over the surplus, in case the advance made on it should not be repaid—a credit given to the Bank by Palmer & Co.? If it was a credit, we may further observe, that it was so only to the extent of the surplus; for, as far as regarded the monies, to secure which the deposit was made, that deposit was only *in presenti* a bailment, and even *in futuro* a payment of Palmer & Co.'s debt to the Bank. The question is, whether or not the deposit, *quoad* the surplus, amounted to a credit given—whether or not Palmer & Co., giving the Bank a power to possess itself of the surplus after repaying its own debt when that debt should become due, can be said to be a giving credit to the Bank.

Now, although, generally speaking, debt and credit are correlative terms, and A. giving credit to B. may seem to imply that B. is indebted to A., yet it may be admitted that the introduction of the words *‘mutual credit’* extends to the right of set off to cases where the party receiving the credit is not debtor *in presenti* to him who gives the credit; accordingly, the relation contemplated by the statute has been held to be established where the debt is immediately due from the one party and only due at a future day from the other. It was so held in *Ex parte Prescott*, 1 Atk. 290, where the mutual credit was constituted by simple contract debts presently due on the one side and a specialty debt not due on the other: *Smith v. Hodson*, 4 T. R. 211; *Hankey v. Smith*, 3 T. R. 507; and many other cases affirm the same doctrine. But in none of those cases was there any uncertainty as to the party said to receive the credit becoming sooner or later debtor *in presenti* to the other; in none of them did the existence of the relation of debtor and creditor depend upon the pleasure of one party; in all of them the party said to have given the credit had placed the other party in a situation which he himself could not alter—had given him funds of which he could not dispossess him, or, which is the same thing, a power over funds which he could not revoke.

The case is materially different where one of the parties has actually become indebted to the other, and can only cease to be so by paying the debt; but the other has only acquired a power which may end in making him debtor or not, according

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as the donor of the power pleases. A. is indebted to B., and B. is neither actually indebted to A. nor under any liability which must needs end in his being A.'s debtor, but has only been intrusted with a power over A.'s funds, to be executed at any future time, if A. pleases; but if A. thinks proper, never to be executed at all. Admitting that, in the event of A. never revoking the *power, a debt will arise, the existence of that debt is defeasable, the only certainty is, that A., in order to revoke the power, must do an act wholly unconnected with giving B. any credit, namely, discharge a debt due to B. Now, it is not denied that Palmer & Co. could at any time have prevented the Bank from ever receiving the surplus, in respect of the possibility of which surplus arising the credit is supposed to have been given. By repaying the monies advanced, they could regain possession of the deposit, and the power of sale was determined without any consent of the pawnee.

Again, not only did the existence of any debt at any time depend upon the depositor, but he had no such debt as could have been proved under a commission against the pawnee. The words, and every "debt or demand hereby made proveable," added to the recent Act for the purpose of including contingent debts, shew that debts, in order to be set off, are supposed proveable, which, indeed, appears to follow from the nature of the case. Suppose the Bank of Bengal had been made bankrupt before selling the paper, it is clear that Palmer & Co. could not have proved against their estate for the contingent surplus. The paper was deposited to answer a specific purpose, and if any use had been made of it inconsistent with the terms of the deposit, the pawnee would have committed an offence, a breach of trust certainly, a transportable misdemeanour, if the Bankers Act (52 Geo. III. c. 63) (1) extends to Bengal. But unless the power of sale was executed by the pawnee (in which case, he became the debtor at once), he never could be said to *have "contracted a debt" either present or contingent to the pawnor, and consequently the pawnor could make no proof.

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Next it must be observed, that though the question is on the

(1) Repealed by 7 & 8 Geo. IV. c. 27, but its provisions are re-enacted by 7 & 8 Geo. IV. c. 29, s. 49.

statute, and though the statutory right of set off extends the right known to the common law, yet the common law principle of mutuality, which is of the essence of set off, must prevail; and if the deposit, or rather its surplus, could not be set off against the demand of the pawnee, so neither shall the pawnor's debt be set off against the surplus. Lord HARDWICKE appears to have mainly proceeded on this view in *Ex parte Ockenden*, 1 Atk. 235. Could the miller, he asked, have refused to deliver up the corn in an action at the corn-factor's instance by claiming to set off a debt due, unconnected with the deposit? and, *vice versa*, could the corn-factor have set off the value of the corn in an action by the miller for money lent at a former time? Holding that both questions must be answered in the negative, he considers this as decisive against the miller's right to set off the debt antecedently due from the pawnor. And Lord MANSFIELD, in giving the judgment of the Court of King's Bench some years after, in *Green v. Farmer*, in 4 Burrow, 2224, after reading his own note of *Ex parte Ockenden*, observes, that Lord HARDWICKE thought he could not construe a dealing to be within the mutual credit clause of the Bankrupt Act, unless it could be so construed in an action of trover, and adds, "That is certainly so." But if the same test be applied to the present case, there is an end of the question; for, first, no one contends that had Palmer & Co. repaid the monies advanced on the deposit, the Bank could have retained the paper for their antecedent debt, *which is one of the points raised by Lord HARDWICKE; and next, had the Bank brought their action upon the notes which they held as indorsees, it is manifest that Palmer & Co. never could have set off the surplus which might arise from the sale of the paper deposited, which is the second of Lord HARDWICKE's points.

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No doubt the case would have been altogether different, had the Bank actually sold the paper and received the surplus prior to the bankruptcy; for then they would have been debtors in that amount to Palmer & Co., and the case would have been one of mutual debts. Supposing the notes discounted then due, or supposing them not yet due, it would have been a case of credit given to Palmer & Co. by them, and of debt due from

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them to Palmer & Co., and so clearly within the statute. This is the case of *Atkinson v. Elliott*, in 7 T. R. 378, but is wholly different from the case at Bar.

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There is nothing inconsistent with what has now been advanced in the decision, in the language used by the Court of Common Pleas in the case of *Rose v. Hart*, 20 R. R. 533 (8 Taunt. 499), where the former case of *Olive v. Smith*, 5 Taunt. 56, was re-considered, and a material qualification added to the generality of the doctrine which had there been laid down. In *Olive v. Smith*, a broker had been allowed to set off a debt antecedently due from his employer against the losses recovered from the underwriters on policies deposited in his hands. In *Rose v. Hart*, the Court held that such a set-off is only competent to the pawnee in cases where the thing alleged to be a giving of credit either constitutes a present cross debt, or must end in one. This limitation of the case of *Olive v. Smith* has, in *subsequent cases, been approved and followed: *Sampson v. Burton*, 2 Brod. & B. 89; *Rose v. Sims*, 1 B. & Ad. 521; and although the Court in *Easum v. Cato*, 24 R. R. 594 (5 B. & Ald. 661), appeared to hold that it was enough, if the transaction would most likely terminate in a debt, yet it is to be remarked that the argument went entirely upon other grounds, and the decision cannot justly be said to have relaxed the restriction by which the Court of Common Pleas had, in *Rose v. Hart*, qualified its former opinion.

If it be admitted that there can arise no right of set off in respect of mutual credit, unless the dealing be, at the time of the bankruptcy, such as must necessarily, and at all events, terminate in creating the relation of debtor and creditor between the parties, then is the present case out of that rule, and the Bank's claim of set off defeated; nor will the reversal of the judgment below be found repugnant to any of the cases, except *Ex parte Deeze*, 1 Atk. 228, and *Olive v. Smith*, of which the latter appears to have proceeded almost, if not altogether, upon the authority of the former, not to mention that it falls, in some manner, within the scope of Lord MANSFIELD's observations in *French v. Fenn*, to be afterwards cited.

It is impossible to regard *Ex parte Deeze* as resting on the

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ground upon which the report in Atkyns places it; and although Lord MANSFIELD, in *Green v. Farmer*, seems to vouch for the accuracy of that report, as well as of the report in the same book, of *Ex parte Ockenden*; he nevertheless refers to Lord HARDWICKE's statement in the latter case, that in the former there had been some evidence of a usage, and gives it as the result of his own inquiry respecting *Ex parte Deeze*, that the packer (the pawnee) was, by the usage, in the *nature of a factor: a reference which we have made to Lord Hardwicke's original note-books has confirmed this statement, that the point of usage was made, and evidence adduced respecting it (1).

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(1) By the kindness of Lord Brougham, the editor is enabled to give the following transcript of the case, as extracted from Lord Hardwicke's note-book; the parts printed in italics are scored under in the original.

1748. (*June 8th, Petition.*)

EX PARTE DEEZE.

Mr. Attorney-General for petitioner:

Davis v. Diston, 10th February, 1731, coram King, C.

Ex parte Clare, 31st July, 1739, coram Hardwicke, C.

Ex parte Le Franc, coram Hardwicke, C.

Affidavit of Raymond, petitioner; Deeze the petitioner; debt for 350*l.* for money lent, and 29*l.* for packing.

Idem.

John Baker's affidavit, book-keeper to petitioner.

Believes it to be usual for packers in London, to buy goods for, and lend money to, their merchants, which they would not advance, but on the credit of, and by reason of, their so doing business for, and having often goods of such merchants in their possession.

Mr. Solicitor-General. 2 Questions.

1. Whether petitioner had in law or equity any special property in the

cloths, either arising from contract, or the course of the trade.

2. If not, whether there has been mutual credit within the Act of 5 Geo. I. about bankrupts.

1. No evidence of any contract.

Petitioner never bought any goods for the bankrupt, and laid out money for him on that account; only pressed the cloths, and sent them on board the ship. There were other dealings between them. Money lent on notes at interest. At the time of the loan no goods were in petitioner's hands. *As to the 29*l.* for packing, I do not dispute that may be a lien like a tailor for cloths, a horse to be shod, &c.; but as to that sum we had a set-off by a debt for wine.*

If no pledge by contract, none from the course of trade; no proof of any such practice; not like the cases cited, for those were for the price of the very goods, not for money lent.

2nd point, as to mutual credit within the Act, that must be in case of mutual pecuniary demands.

[*Not been held so strictly.*]

In the case of *Davis v. Diston*, the cloth was sent to the factor to be sold, and the factor had a special property in it. Affidavit of Norton Nicholls, the bankrupt. *He is indebted some 30*l.* for packing, and*

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From hence, and *from Lord HARDWICKE's subsequent decision in *Ex parte Ockenden*, as well as from what has been said both in the Common Pleas on *King v. Flint*, 8 Taunt. 21, and by Lord ELDON in *Ex parte Flint*, 18 R. R. 12 (1 Swanst. 30), it may be considered that *Ex parte Deeze* is no longer law as reported in Atkyns, and that, but for a special custom, giving the pawnee a general lien, the mere deposit, whether of goods or of securities, for a particular purpose, as it certainly will not constitute the pawnee a debtor, so it will not amount to a giving of credit at all, unless coupled with an authority given to the pawnee of selling them, such power being given absolutely and not countermandable. But it is equally certain that *Olive v. Smith* was decided upon the assumption that *Ex parte Deeze* is a binding authority; and when we find that the language of the Court in **Rose v. Hart* so materially varies and narrows the principle which had been the guide in the former decision, and that the case itself is disposed of in a way not easily reconcileable with *Olive v. Smith*, and in no way whatever reconcileable with the report of *Ex parte Deeze*, upon which *Olive v. Smith* had been grounded; and that the view now taken may be reconciled with the latter and more correct, or rather, more authentic opinions of Lord HARDWICKE, and with the latter and more correct opinions of the Court of Common Pleas, there seems to be no good reason for supporting a claim which is both at variance with principle, and runs counter to a greater weight of authority than can be produced in support of it. With respect to the case of *Parker v. Carter*, 1 Cook,

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Deeze is indebted to him in 15l. for wine.

[*This proves mutual credit.*]

William Price's affidavit. A packer for 14 years; never apprehended that he had any property in the goods; usual for him and other packers to buy goods for their merchants, and when they do so, to name their principals, and the seller debits them for them.

Mr. Wilbraham, ad idem. *If the packer may lay his hands on the goods,*

and stop them for another debt, it will be opening bad consequences to trade.

The bankruptcy does not give him a greater interest.

Mr. Green, ad idem.

Ordered an account to be taken, and the money due on the balance of the whole account to petitioner, to be deducted out of the money arising by sale of the Lancashire bags in question, and the surplus paid to the assignees.

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B. L. 548, it may be observed that the defendants rested their title to a set off upon a lien which they claimed to have "as general agents" of the bankrupt: and the report of the case in Cook's Bankrupt Law gives this as the ground of the decision in their favour. Lord Chief Justice GIBBS, in *Olive v. Smith*, though on the granting of the rule *nisi* he states *Parker v. Carter* as a case of mutual credit, yet afterwards, the particulars having been inquired into, seems to admit that it was a case of lien, (5 Taunt. p. 65), and accordingly he rests his judgment mainly upon *Ex parte Deeze*, and mentions also *Ex parte Boyle*, 1 Cook, B. L. 561, and *French v. Fenn*.

Ex parte Boyle was the case of a client who owed a sum to his solicitor for work done and money lent, and who gave the solicitor, by way of loan, his notes of hand to a larger amount, part of which notes were not due, and not paid by him, till after the solicitor's bankruptcy. There the notes, being payable to the *solicitor's order at the client's bankers, were treated as a loan by the parties: at the date of the bankruptcy the lender of the notes had become liable to pay, at all events, the contents of them to holders chosen at the solicitor's pleasure, they being made payable to the order of the solicitor; and nothing could prevent this liability from ending in a debt from the solicitor to the client, but the solicitor himself repaying the money advanced upon them. The client could not, by any act of his own, prevent his money coming into the hands of the solicitor, or of the payee, chosen by him, to a fixed amount and at specified times. This case, therefore, comes clearly within the restriction imposed by the case of *Rose v. Hart*, on the doctrine laid down in *Olive v. Smith*. And the same observation applies to *Ex parte Wagstaffe*, 13 Ves. 65, where the credit in question arose from an acceptance of the bankrupt, payable after the bankruptcy, but certainly payable then.

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The case of *French v. Fenn*, Cook, B. L. 536, is also distinguishable from the one at Bar, although it must be allowed to have gone further than any decision which preceded it, excepting *Ex parte Deeze*. But it does not appear that the debt against which the price of the pearls, when sold, was allowed to be set off, was, in any part, contracted before the agreement

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respecting the pearls ; and Lord MANSFIELD expressly says, that Fenn “ had trusted Cox (the bankrupt), with other goods, which, in all probability, he could not have done but for the pearls being left in his (Fenn’s) hands.” This would make the case nearly the same with *De Mainbray v. Metcalf*, 2 Vern. 698, where Lord COWPER relies mainly upon the debt set off being in fact an advance made on the pawn. Lord MANSFIELD, in *French v. Fenn*, seems also to rely much on the circumstance peculiar *to that case, of the other two partners in the adventure (Cox and Holford) having agreed to allow Fenn interest on the money which he had advanced to pay for the pearls in the first instance : and one thing is quite clear, viz. that by the nature of the transaction the rights of each partner, until sale, being to an undivided third, and Fenn having the deposit for sale, neither of the others could have obtained his share ; nay, both the others joining could not have obtained their shares, nor gotten the whole pearls out of the pawnee’s hands, until the sale, which must at once render the credit to the pawnee certain. If it be said that Cox might have assigned his right to his share of the eventual price, *minus* his proportion of the purchase-money (in the same way that Palmer & Co. might have assigned their right to the contingent surplus), then it must be also observed, that this consideration takes the case out of the rule laid down in *Rose v. Hart*, and could not stand with the decision in *Rose v. Hart*. It ought to be observed further, that *Ex parte Deeze* was relied upon simply by Mr. Justice BULLER, in deciding *French v. Fenn* ; both Lord MANSFIELD and Mr. Justice BULLER seem to have been very much influenced by what they term considerations of general justice.

Upon the whole, then, we are of opinion that the judgment in this case must be reversed, and that the verdict taken by consent, subject to the opinion of the Court, should stand, and the *postea* be delivered to the plaintiff. The interest, too, must be calculated subsequent to the time up to which the verdict for interest was taken ; and this must be added to the verdict.

ON APPEAL FROM THE SUPREME COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL (1).MAYOR OF LYONS AND OTHERS *v.* THE EAST INDIA
COMPANY AND THE ATTORNEY-GENERAL (2).

(1 Moore, P. C. 175—299.)

The introduction of the English law into a conquered or ceded country does not draw with it that branch which relates to aliens, if the acts of the Power introducing it shew that it was introduced, not in all its branches, but only *sub modo*, and with the exception of this portion. The English law incapacitating aliens from holding real property to their own use, and transmitting it by descent, or devise, has never been introduced into the East Indies, so as to create a forfeiture of lands held in Calcutta or the Mofussil by an alien, and devised by a will executed according to the Statute of Frauds for charitable purposes.

Semble. The Statute of Mortmain does not extend to the British territories in the East Indies (3).

Observations on the proper mode of dealing with gifts to foreign charities.

THIS was an appeal from a decree of the Supreme Court of Judicature at Fort William in Bengal, of the 23rd February, 1832, made in four causes which had *been consolidated, touching the construction of the will of the late Claude Martin, and the bequests thereof.

Major-General Claude Martin was a native of *France, having been born at Lyons. In 1763 he entered the service of the East India Company as a cadet, and after passing through the various intermediate grades of his profession, he attained in 1793 the rank of a major-general. He never, however, received full pay for any higher rank than that of captain, with which he entered, in 1766, into the service of the Nabob Vizier of Oude, under the sanction of the British Government; and he continued in that service, occasionally commanding the troops

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(1) Present: Members of the Judicial Committee: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, the Chief Judge of the Court of Bankruptcy.

Privy Councillors—Assessors: Sir Alex. Johnston, Sir Hyde East.

(2) See *Mayor of Lyons v. Adv.-*

Gen. of Bengal (1876) 1 App. Cas. 91; approved *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L. R. 6 P. C. 381.

(3) Approved on this point by Lord LYNDDHURST, L. C., *Mitford v. Reynolds* (1842) 1 Ph. 185, 192, 12 L. J. Ch. 40.

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of the Nabob Vizier, residing at Lucknow, and receiving his half-pay as a captain from the East India Company, until his death on the 6th September, 1801.

On the 1st of January, 1801, General Martin signed and executed his will, bearing that date, in the presence of the British Resident at Lucknow, and two other persons, who duly attested its execution. At that time, and at the period also of his death, he was possessed of large landed estates in the provinces of the Nabob Vizier, where the Mahomedan law is the law of the country; in the territories of the East India Company, governed by the regulations of the Governor-General in Council; in the city of Calcutta, under the jurisdiction of the Supreme Court; in the town of Chandernagore, originally a French settlement, and wherein the French law still prevails, although within the presidency of Fort William; and in the kingdom of France; he was also possessed of very considerable personal estate of every description, including large investments in the Government securities of the East India Company, and in the British funds.

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The will was composed and written by the testator himself, as he therein declares, in the English language, of which he had a very imperfect knowledge. It was *divided into 84 articles or clauses, and there was added to it a paper described by the testator as "Abstract No. 1 A," containing a recapitulation or statement of the legacies, and other bequests, contained in the different clauses of the will, with the amount of each pecuniary bequest set forth in figures.

The abstract was thus entitled, "No. 1 A, Abstract of the articles and pensions and sums, to be paid as I gave and bequeathed by my will and testament wrote by me the 1st of January, 1798, of which abstract I mentioned in folio 6, line 9th, and folio 7, line 10th, and also afterward. This is wrote by me. Witness my hand.—CL. MARTIN."

Annexed to the will, and also referred to therein, were certain accounts during four years, 1795, 1796, 1797, 1798, to 1st May, 1799, taken from the ledgers or account-books of the testator, shewing the debts due by, and to him, with his own valuation of the various kinds of property he possessed, both real and

personal, balanced on the 30th April in the first three years, and on the 1st of May in the last year.

The abstract and these accounts were proved with the will.

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By the first article of his will, the testator, after giving their freedom to all the women, males, and women servants, eunuchs, and others that belonged to him, and should be in his service at the time of his death, and commending therein especially his faithful girl Boulone, or Lise, who had lived with him as his wife, to the especial care of the persons thereafter named as executors of his will, he expressed himself in these terms (1): “I desire, that as soon as I am dead, that the sum of 4,00,000 sicca rupees, (or four lacks of *rupees,) be put aside, from the best part of my fortune, and be placed at interest in the most secure fund, as that said interest may serve to pay the donation and monthly pensions, as hereafter mentioned, in their several articles, as also as may be seen by the recapitulation or abstract list of the pensions and donations I have made, and sealed and signed by me, and marked No. 1, A, in which the total of yearly, and monthly pensions, I have made to every one mentioned in this will and testament are; as also for other sums to be paid for once are included, amounting to sicca rupees, [blank left in the original] as that they may be a sufficient sum for the answer of all these gift, pension, and others I have mentioned, to put aside from the best of my fortune the sum above said, for 6,00,000 sicca rupees, [to be invested in East India Company’s notes or bonds] and as I have made several others large gift for *charitable purpose (2) as will be seen by the several articles hereafter mentioned, which at this moment stand on the list or abstract No. 1, A; for building other establishment, to the sum of sicca rupees 7,74,000, and for once 2,85,800 sicca rupees (3); and also for a sum to be paid annually, the sum of sicca rupees for monthly pensions, annually 35,760 (4) for these above sums. The next best of my fortune is to be appropriated for

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(1) The extracts from the will are literal, the language and orthography being preserved.

(2) Augmented to 10,74,000 sicca rupees.—CL. MARTIN.

(3) 2,95,300.—CL. MARTIN.

(4) Augmented to 39,760 sicca rupees.—CL. MARTIN.

These additional sums were expressed by interlineation in the original will.

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these establishment and charities, and others building, as my tomb, seray women, houses, compounds, and others, as mentioned in the several articles as hereafter mentioned * * with power to draw occasionally the sums required, for to go on with the buildings that are to be erected. The interest will serve to pay the annual pension, donation, or expenses for entertaining and keeping in good order the said building. Any sum remaining for the interest of the sum deposited in Honourable Company, in theirs promissory notes or bonds, or others of more or less interest, and under others denomination than Company's paper, such as bond of Government, or others bearing interest, as I said any sum remaining *from the interest, after having paid the several annually and monthly pension, this sum remaining is to serve for to purchase more Stock in the said secure fund for the time being, as to be also placed as the other, for to be enabled to produce also an interest for the benefit of my estate. And when a sufficient sum or sum, equal to be enabled to increase the four establishments mentioned in articles one, two, three, four, or five, and in the succession of years, in case of good management, luck, and good fortune, no accident happening, that these sums deposited, or others that may be deposited, as I may hereafter mentioned, I also desire, request, or command my executor, administrators, or their assigns, that they would devise with themselves, and with the best advice they could receive, that in case, as I say'd, by succession of time, that the sum that may be deposited exceed by great deal, the interest necessary to be paid for the monthly or annual pension, donation, &c., yearly and monthly, as mentioned, and that they are a sufficiency without interfering or touching any of the principal for the annual or monthly pension and disbursement above-mentioned, then they may, after having well considered, make any new establishment for charitable purpose on the same plan, and with the same formality to be observed in them as mentioned to those I have herein recommended, that the donor may be known after his death.

* * I am in hope my wishes and last will be executed and fully performed after my death; and to be understood also, that at the, or after the death of those, to whom I have given

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pension for during their lives, at theirs death these are to be resumed, and be brought to the stock of my estate, as to serve to increase the establishment, as hereafter will be mentioned, and to create or establish others, as I may devise during the course of my life; or if I have not done it myself, they are to be done as may be devised by my executors, administrators or assigns, or the trustee of my estate, after consulting able men on the subject of establishing useful, and charitable establishments for the public good. My executors, administrators, or trustees, I may and will, if time admit my choosing properly, name them at the end of this will and testament."

In the following articles of his will, from 2 to 17, the testator proceeded to make various bequests of legacies, and annuities, to the females of his household and to his servants. These legacies, as summed up in the abstract, amounted to 13,460 rupees.

By the 17th article the testator directed the payment, as soon as his death should happen, of the sum equivalent to the amount of the monthly and yearly pension, amounting to 13,460 sicca rupees, and an investment to be made of the sum of 2,00,000 rupees, in the East India Company's treasure; and he also directed the payment of two months' wages, over *and above the wages he might owe to his servants at his death; and in the abstract there was a corresponding memorandum after the sum of 13,460 rupees.

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By the 18th and 19th articles the testator gave legacies for the purpose of building a house for two of his women, Boulone, or Lise, and Sally, and he also gave several legacies to his women and servants, the amount of which was again recapitulated in the abstract.

By the 20th article he gave various bequests to his relations in France.

In the 21st article the testator gave a life-interest in some, and his absolute property in other, parts of his landed estate at Lucknow, to the two women, Boulone and Sally.

The 22nd article was principally a declaration of his religious sentiments.

[By the 23rd article the testator directed 1,50,000 rupees to be invested, and the interest to be applied in equal parts for the

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relief of the poor of Lucknow, Calcutta, and Chandernagore. Minute directions were given for the administration of the fund, and for the perpetuation of the donor's memory.]

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By the 24th article, the testator gave and bequeathed the sum of 2,00,000 sicca rupees to the town of Calcutta, [to found] "an institution, the most necessary for the public good of the town of Calcutta, or establishing a school for to educate a certain number of children of any sex, to a certain age, and to have them put prentice to some profession, when at the conclusion of their school, and to have them married when at age; and I also wishes that every year premium of few rupees, or other thing, and a medal, be given as to the most deserving or virtuous boy or girl, or both, to such that have come out of that school, or that are still in it, and this to be *done on the same day in the month as I be died; that day those that are to married are to be married, and to have a sermon preached at the school to the boy and girl of the school, afterward a public dinner for the whole, and a toast to be drink'd in memorandum of the fondator. This institution is to bear the title of La Martinière, and to have an inscription, either on stones or marble, in large character, to be fixed on any part of the school, on it wrote, 'Instituted by Major-General Martin, borne the . . . of January 1735, at Lyons, who died the day, month, and year, mentioning the day, month, and year, and buried at . . . mentioning the place.' And as I am little able to make any arrangement for such an institution, I am in hope Government or the Supreme Court, will devise the best institution for the public good, and to have it, as I said above mentioned, the name of the institutor. After every article of my or the will and testament is or are fully settled, and every article provided and paid for the several pensions, or other gifts, donation, institution, and other, any sum remaining may be made to serve—first, buy or build a house for the institution, as that it may be made permanent and perpetual by securing the interest by Government paper either in India or Europe, that the interest annually may support the institution, for this reason I give and bequeath 1,50,000 sicca rupees more, according to the proportion that may remain after every articles of this testament is fulfilled, then

this sum to be added for the permanency of that institution, making the sum of 3,50,000 sicca rupees."

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In the 25th article the testator gave and bequeathed 2,00,000 sicca rupees, to be deposited in the most secure interest fund in the town of Lyons, in France, *and the magistrates of that town to have it managed under their protection and control, for the foundation of an institution, to bear the name of Martinière; and in case the 2,00,000 sicca rupees were not sufficient for a proper interest to support the institution, and buying or building the house therein directed, he gave and bequeathed an additional sum of 50,000 sicca rupees, making 2,50,000 sicca rupees; and he also gave and bequeathed the sum of 4,000 sicca rupees to be paid to the magistrates of the town of Lyons, to liberate from prison so many prisoners for small debts as it would extend to.

The 26th article contained a direction, that if the pensions to his legatees should not be regularly paid, the sums allowed for daily distribution in charity should be stopped, and applied for that purpose; and a request, that the magistrates of Calcutta, or other place, or the prince or governor, would remove any of his executors or trustees that should misbehave themselves.

The 27th article was in these terms: "My house at Calcutta, formerly the Bengal Bank, the one at Champaul Gaut, the one formerly the Manege, the one at Intally, are not to be sold, but kept for the estate; also my house at Chandernagore is not to be sold. My estate of Nuzupheur, or Martinghur, is to be kept. And I desire, and it is my wishes, if it is to be put under the management of Mr. Joseph Quierose, as also the farm I rent from Almessally Kaun, in the Corra districts, with also the farm I rent from Bisenaut Gattumpour Magoor Nagur Panum, &c. These farm are to be continued farming, and indigo to be made on them, following the same mode and rule I have adopted, as to have the indigo made cheap and good, and by that mode very feinfitable. And as to facilitate *Mr. Joseph Quierose, he is to have a third share of the benefit accruing from the neat produce from Europe to Bengal, from that indigo." It then proceeds to give more

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specific directions as to the carrying on the plantation of indigo; and the testator then says: "My house at Luckperra, or Constantia House, is never to be sold, as it is to serve as a monument or tomb for to deposit my body in; and the house is to serve as a college, or for educating children and men, for to learn them the English language and religion, those that should wishes to be made Christian. At or by that house, the charity, as mentioning in article 23rd, is to be made, and there to be distributed the grain, flour, or cash to the poors, and the inscription is to be fixed on the wall of the house, to some place where the poors are to assemble and receive the charity. The same sort of ceremony is to be made, and inscription wrote, in memory of the institutor, as said in the articles 23rd. A large sum or establishment will be made and wrote in this will and testament, to keep the monument in good order; and a proper quantity of peoples of every denomination for educating children and learning English."

The 28th article was in these terms: "I give and bequeath the sum of 5,000 sicca rupees, to be paid annually to the magistrate or Supreme Court of Calcutta, or to Government. This sum is to serve to pay the debt of some poor honest debtor detained in jail for small sum, and to pay as many small debt, and liberate as many debtor as the sum can extend. This liberation is to be made the day month I died, as a commemoration of the donor; and, as being a soldier, I would wished to prefer liberating any poor officers, or other military men detain for small debt, preferable *to any other. And I also give and bequeath the sum of 1,000 sicca rupees, to be paid yearly, and to make a distribution of it to the poor prisoners remaining in jail, on the same day as the one mentioned above; both sums making 6,000 rupees every year."

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In the 29th article the testator gave several small bequests.

In the 30th article the testator directed that his body should be embalmed, and deposited in a coffin of sisso wood, in the cave of his house at Constantia, which was not to be sold; and it also contained very specific directions for the care of his house, for the pension of his servants who were to keep it, for the privileges of the two women, Boulone and Sally, if they should choose to live

there, and a provision of 4,000 rupees for their tombs, if they should choose to be buried there.

The 31st article contained directions for the building of Constantia House, if it should not be finished at his death.

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[The 32nd article gives directions for keeping Lackparra House, or Constantia House, as a college for instructing young men in the English language, and suggests that the house may be used as a temporary lodging for strangers coming to Lucknow.] It then proceeds to give specific directions as to the establishment to be kept up at Constantia House, the management of his (1) farms by Mr. Joseph Quierose, or by an European superintendent, if Mr. Quierose should refuse the trust, and the remittance of the produce to Europe.

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In the 33rd article the testator proceeds thus : "I nominate by this my will and testament, Messrs. Joseph Quierose, the house of Messrs. Barber, Palmer, Messrs. Jacques, Maximin, Deverinne & Sons, the house of Messrs. Hamilton and Aberdeen, and to communicate in Europe to my nephew or relation, for my executors, administrators, assigns, or trustees. * * My brother, Louis Martin, is to be joined as one of my executors, administrators, assigns, or trusty ; and in his default, to nominate my nephew, son of Pierre Martin, as any others in succession, as to have one of my relation joined in the execution of my will and testament. And I request Mr. Joseph Quierose to translate the said will, and send one to my relation in French, and one to Messrs. Deverinne. I have tied with a green ribbon an abstract of articles, or list, of the sums to be paid as pension, monthly and annually, and the several sum for establishment and others. This list is already mentioned in this will at article 1st, and at article 17th. I have also tied to this will an abstract ledger for the year —, by which it will appear that I am worth thirty-three hundred thousand six hundred and eighty thousand sicca rupees. All my account will be found in my offices, as per list with Mr. ——. The ledger will shew what due to me, and what owing, and all other property in India and in Europe ; and I request my same agent in England to be continued employed, Messrs. William Thomas Raickes & Co., and Messrs.

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(1) *Sic.*

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William Paxton & Co. After all accounts being settled, and sum insured for the interest for the payment of the several monthly pension, and the several payment of gift, and others, and also the several establishment, if a surplus above 100,000*l.* sterling, or about ten lacks of sicca rupees, remainin of my estate, that above surplus of ten lacks of sicca *rupees, is to be divided in such a manner, as to increase the several establishment of Calcutta, at Lyon, and Lucknow, as that they may be permanent, and exist for ever. Besides the sum allowed for finishing all the building and other of Constantia House, which I suppose may amount to 2,00,000 sicca rupees, I also give and bequeath the sum of 1,00,000 sicca rupees for the support of the college and other school, to be regulated as the Calcutta establishment, as per articles 24 ; as also, as the establishment at Lyon, articles 25 ; the gift for the poor of Lucknow to conducted as mentioned in articles 23. I also give and bequeath the sum of 4,000 rupees, to be paid annually, for to liberate as many prisoner for debt at Lucknow as it may extend : and if none, then that sum is to remain to the estate. Any sum remaining is to be placed at interest, for to accumilate and improve the several establishment and concern of indigo."

The 34th article contained several specific bequests of jewellery and mourning rings to his women and executors, and contained a provision for the payment to his executors, administrators, &c., of the usual commissions, and as the Supreme Court should think necessary for their trouble.

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This will, together with the abstracts, was duly proved by Gavin Hamilton, Alexander Aberdeen, John Caulfield, John Palmer, and Joseph Quierose, in the Supreme Court at Calcutta, in the year 1800. It was also proved in the Prerogative Court of the Archbishop of Canterbury by the same executors, with the exception of Gavin Hamilton, on the 18th of July, 1803 ; by Louis Martin, the testator's half-brother, on the 5th of April, 1802 ; and on his death letters of *administration to the testator, with his will annexed, were taken out by the appellant, Christophe Martin, on the 13th of August, 1817.

For the purpose of having the several charities mentioned by the testator established, and for carrying into execution the trusts

of his will, four suits were instituted in the Supreme Court of Judicature at Fort William, in Bengal.

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The first was an information and bill filed on the 20th June, 1816, by Edward Stredtell, Esq., the then Advocate-General for the East India Company, at the relation of John Martin Wickins, against Palmer and Deverinne, two of the executors, for an account of the personal estate of the testator, and for the purpose of carrying into effect the direction contained in the 24th article of his will, for the establishment of the charitable institution in the town of Calcutta. The defendants having filed their answers to this information, the cause came on to be heard on the 2nd November, 1816, when the Supreme Court established the charitable bequests to the town of Calcutta, and directed the sum of two lacs of sicca rupees, confessed to be in the hands of Palmer, to be paid into Court, and applied in establishing that charity; and ordered the Master of the Supreme Court to approve of a proper scheme to effectuate such charitable purpose, and the Master was to take the usual accounts of the personal estate of the testator, and of his debts, legacies, and funeral expenses, and the Supreme Court directed a commission to issue to receive the claims of the legatees in Great Britain, Ireland, and France; and ordered the costs of the suit to be taxed and paid out of fund in the hands of the executor John Palmer.

The second suit was instituted on the 26th August, *1818, in the same Court, in the name of Adam Peter Eustache Godinot, Mayor of Lyons, acting in behalf for, and in the name of, the community of the city of Lyons, against Palmer and Deverinne, the executors of Claude Martin, praying that he might, on behalf of the city, be at liberty to receive the several legacies mentioned in the 25th article of the testator's will, with interest; that a provision might be made to enable the community of the city, or its magistrates, to receive 4,000 rupees per annum, to be applied as directed by the testator; that his landed property at Calcutta and Chandernagore might be declared to be personal property, and that Palmer and Deverinne should give an account of his real and personal property; and that the city of Lyons might be declared entitled to one-third of the clear residue of it.

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On the 4th August, 1819, the defendants put in their answers, in which the accounts of the estate were set out at great length.

The third suit was instituted on the 22nd October, 1818, by the appellant, Christophe Martin, one of the legatees named in the will of General Martin, and the son and executor *sous benefice d'inventaire* of Louis Martin, the testator's half-brother, and Marie Desgranges Martin, the widow, Pierre Ballofett and Claudine his wife, the daughter, and François Martin, the youngest son of Louis Martin, all of whom claimed beneficial interests under the will, against Robert Spankie, Esq., the then Advocate-General, Palmer and Deverinne. In this suit the plaintiffs insisted that Louis Martin was entitled, under the Mahomedan law, to all the testator's undisposed-of real and personal estate; that upon his death they succeeded to his right as his representatives and legatees; and they prayed *for an account of the testator's real estate, that his real estates, where-soever situate in India, might be sold; that Palmer and Deverinne might be charged with the loss arising from their negligence; and that the plaintiffs might be declared entitled to all sums invested for the payment of pensions and annuities, as the pensioners and annuitants might respectively die, and that the principal might be named in the meantime; that Palmer and Deverinne should deposit all securities and title deeds with the Accountant-General; and that the plaintiffs might be declared entitled to these legacies, and all the undisposed residue of the testator's estate, and also to a legacy to his half-brother, Pierre Martin, which had lapsed by the death of Pierre Martin in the lifetime of the testator.

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The defendants, Palmer and Deverinne, on the 4th March, 1819, put in their answer to this bill, in which they admitted their receipt of very large sums in respect of the testator's personal estate, and of the rents and profits of his real estate in the provinces in India, subject to the East India Company, in Calcutta, and in Chandernagore: but they stated that Joseph Quierose had taken possession of, and received the rents and profits of, the testator's real estate in the province of the Nabob Vizier; and that Louis Martin had taken possession of the

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testator's personal estate, public funds, and stock of the East India Company, out of which he ought to have discharged the legacies to the testator's relations in France; and that Palmer had remitted to England two lacs of rupees, amounting to 25,893*l.* 6*s.* 8*d.* sterling, to Messrs. Paxton, Cockerell, Traill & Co., of London, to pay the Mayor of Lyons, and that a suit had been instituted against Messrs. Paxton, Cockerell, Traill & Co., by the appellant, *Christophe Martin, and the Mayor of Lyons, in the Court of Chancery in England, for that sum.

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The fourth suit was instituted on the 19th February, 1819, by Palmer and Deverinne, the two defendants in the former suits, filing a cross-bill against the appellants, Christophe Martin, Marie Desgranges Martin, Pierre Ballofett and Claudine his wife, and François Martin, in which they stated that Louis Martin had, in the character of executor of Claude Martin, possessed himself of various sums of stock and other property, and prayed for an account in the usual manner of the property of Claude Martin which had thus come into the hands of Louis Martin.

The answers of the defendants to this bill were taken under a commission, and were not filed until about the 24th July, 1823. That of the appellants, Christophe Martin, Marie Desgranges Martin and François Martin, admitted that Christophe Martin had obtained letters of administration to Claude Martin; and Christophe Martin stated, that it appeared from Louis Martin's accounts that he had possessed himself of stock belonging to the testator, Claude Martin, to the amount of 45,707*l.* 9*s.* 5*d.* sterling, or thereabouts, with which it appeared that he had paid all the testator's legacies to his relations in France, except one to Pierre Martin, who died in the testator's lifetime: but they denied that they had possessed themselves of any part of the property of Claude Martin or Louis Martin, because the succession of Louis had, by the laws of France, been accepted *sous bénéfice d'inventaire*; and they submitted, that by (1) what was due from the estate of Louis to that of Claude Martin, ought to be paid into the hands of Claude's executors *in Europe; but they stated that such account was the subject of a suit, at that time, in the French tribunals.

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The answer of Pierre Balloffett and Claudine his wife was to a similar effect, except that they admitted having received 40,000 francs from Louis Martin on account of the legacy left to Claudine by the testator, Claude Martin.

No account of the application of the sum of 45,707*l.* 9*s.* 5*d.* was ever given to the Supreme Court, though, in a subsequent stage of the proceedings, an admission was stated to have been made by the French legatees before the Master, of their having received from Louis Martin their legacies, amounting to 1,85,000 rupees, or about 28,125*l.* sterling.

On the 16th of August, 1819, by an order of the Supreme Court, the three first-mentioned causes of *The Advocate-General v. Palmer*, *The Mayor of Lyons v. Palmer*, and *Martin v. The Advocate-General*, were consolidated, and the Master was directed to take an account of the rents and profits of the testator's real estates out of Calcutta, come to the defendant's possession; that the parties to the two latter suits should be parties to the account then taking in the Master's office, in the suit of *The Advocate-General v. Palmer*, and be bound by it; that the Master should make one report in the three causes; and that 20,000 rupees should be paid out of the assets in the hands of the executors, to the agent of the Mayor of Lyons, on account of the legacy mentioned in the 25th clause of the will, for the liberation of prisoners at Lyons.

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On the 25th November, 1822, the Master made his report in the three consolidated suits, whereby he found, that the personal estate of the testator, and the *rents and profits of his real estate, as well out of as in Calcutta, and come to the hands of Palmer and Deverinne, after giving credit for necessary disbursements, and making all just allowances, amounted, on the 31st October then last, to sicca rupees 28,55,963, 5*a.* 4*p.*, and the particulars of which he therein set forth; and after stating that he caused the usual advertisements for creditors and legatees to be made, but that no creditor or legatee had come in before him, the usual claims under the 25th article of the testator's will having been satisfied under the commission of 11th December, 1816, and that the sum of 25,833*l.* 6*s.* 8*d.* was admitted to have been paid by Palmer on account of such claims, he proceeded to set forth who

were the several persons next of kin of the testator at the time of his decease.

This report was confirmed without opposition on the 29th November, 1822.

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On the 2nd December, 1822, a decree on further directions was made by the Supreme Court, by which it declared that Palmer and Deverinne had fully accounted, and ordered them to pay in the balance in their hands, and that thereupon they should be absolutely discharged and exonerated from the trusts and executorship of General Claude Martin's will, and that the Accountant-General should be appointed receiver of his real estates; and then, after directing some inquiries as to a supposed indemnity bond from Palmer, which on inquiry was found never to have been given, it declared that interest was payable on the 2,00,000 rupees bequeathed to the town of Calcutta from 30th September, 1801, being twelve months from the testator's death, to the 6th September, 1816, when that sum was paid into Court by Palmer and *Deverinne; and it directed the Master to inquire whether the estate of the testator was adequate and sufficient to pay the additional bequest of 1,50,000 rupees, given by the 24th article of it, to the town of Calcutta, after providing for every other article of it; and for the payment of the annual pensions, gifts and institutions therein mentioned; and if the Master should so find, it declared the town of Calcutta entitled to this additional sum, with interest from the time the assets should be found sufficient for such payments. It then proceeded to establish, in a similar manner, the bequests to the city of Lyons and to direct their payment with interest, credit being given for so much of them as had been already paid, and to direct the Master to inquire what principal sum would be sufficient to raise sicca rupees 4,000 annually for the liberation of prisoners detained at Lyons for small debts, and the rates of interest borne by the Government securities in which the funds of the testator had been invested since they came into the hands of Palmer; and the Accountant-General was ordered to pay and allow interest on the bequests to Calcutta and Lyons accordingly; and the Master was ordered to inquire and set apart a certain

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sum for the payment of the testator's annual and monthly pensions, and 4,000 rupees for Boulone and Sally's tombs, as directed by the 30th article of the will, and to inquire what sums had been already expended, and what would be sufficient, for the keeping up the establishment at Constantia House, and provide for the repairs of the testator's, Sally's and Boulone's tombs, and that such sums should be set apart, together with that necessary for the payment of the pensions in the first instance. The Master was also *to ascertain, whether the foundation and establishment of the college by the 33rd clause of the will directed to be attached to the foundation of the house, and the bequest of 4,000 sicca rupees per annum for the liberation of prisoners for debt at Lucknow, could, with reference to the intentions of the testator, and the sanction and disposition of the Government at Lucknow, be carried into effect, and in what manner, and if it could, he was to allow interest on 1,00,000 sicca rupees, bequeathed for the establishment of the college, from the 30th September, 1801; and he was to inquire the amount of the principal which would produce 4,000 rupees annually, in the same way as for the sum bequeathed for the prisoners at Lyons; and to inquire what sums of money had been paid to, or received by Louis Martin, or by any person on his behalf, or his representatives, and how the same and every part thereof had been applied and disposed of; and also to inquire who were the five poorest relations and nearest of kin of the testator, and to set apart 20,000 rupees with interest for them, according to the 20th article of the will; and he was to inquire whether the will was duly executed and attested according to the Statute of Frauds, so as to pass real estates at Calcutta; and it declared the proceeds of a house mortgaged to the testator, and sold since his death, to be personal estate; and it declared that the real estate of the testator, situate in Calcutta, was of the nature of freehold estate, and that the heir-at-law of the testator, according to the law of England, was entitled thereto, and to the rents and profits thereof, if the will was not duly executed; and the Master was to inquire who was the testator's heir-at-law and next of kin, according to the English and Mahomedan *laws, and what was the domicile of the testator in his lifetime and at the time of his death, and whether by the

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laws and usages obtaining at Lucknow, the inheritance and succession of deceased persons, being European Christians, were regulated by the Mahomedan law, or by the law of the place or country of the birth, or by what other law or usage; and the Master was to report whether there would be any residue of the testator's estate; and directions were given for taxing the costs of all parties.

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In October, 1828, the Master made a separate report, as to the payment of the pensions to the different legatees then living.

On the 3rd of February, 1830, the Master made his general report, by which, after stating the rate of interest in the Government securities, during the periods he was directed by the decree, he found that 3,11,300 sicca rupees were sufficient for the payment of the legatees and annuitants then living; that the bequest of the sum of 4,000 sicca rupees for the liberation of the prisoners at Lucknow could not be carried into effect; that the will was signed, sealed, and delivered as his will by the testator, in the presence of three witnesses; that he had annexed a pedigree, showing that Marie Desgranges Martin, Christophe Durand, Fleurie Martin, Charles Cavier, Marie Martin, and Catherine Charlotte Martin, were the next of kin and personal representatives, by the law of England, of the testator, and that by the Mahomedan law, which makes no distinction between heirs and next of kin, the property of the testator would be divided as therein mentioned: that at the time of his death the testator was domiciled at Lucknow; that sicca rupees 68,698 would be a proper *sum for repairing the establishment at Constantia House, and that sicca rupees 2,01,000 would be sufficient for keeping up the establishment and providing for the repairs of the buildings and tombs there; and that there was not before him sufficient evidence to decide whether the foundation and establishment of the college directed to be attached to the establishment at Constantia House could, with reference to the disposition or sanction of the Lucknow Government, be carried into effect; but as no further evidence was likely to be obtained, he begged to attach to his report the evidence relating thereto.

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The evidence annexed to this report consisted of a correspondence between the officers of Government and the Master, and the copies of two letters from the Resident at Lucknow to Government, the first of which was as follows:

“To G. Swinton, Esq., Secretary to the Government in the Political Department, Fort William.

“SIR,

“I have the honour to acknowledge your letter of the 28th ultimo, with its enclosure, directing me to report if any correspondence had taken place, subsequent to the 4th April, 1818, relative to certain bequests of the late General Martin.

“I beg you will inform his Excellency the Right Honourable the Vice-President in Council, that I do not find in the records any correspondence on those subjects subsequent to that date; but I have reason to believe my predecessors had, and I myself have had, frequent conversations with his Majesty relative to these bequests, and a disinclination has ever been evinced to allowing them to be carried into effect, arising principally from that feeling so general *amongst the native powers of India, that it would derogate from their dignity, and be a reflection on their liberality and on their power, to allow even an individual in their own dominions, much less a subject of a foreign state, to found institutions, which, in their opinion, are the exclusive privilege and rights of rulers.

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“To the objections thus raised are to be attributed the hitherto silence regarding General Martin's most charitable and liberal purposes; and I am not yet prepared to hold out expectations that the King of Oude will consent to carry the intentions into effect, but I shall endeavour to impress on his mind that his dignity and liberality cannot be injured, by his sanctioning that, which will so benefit the rising generation and the present poor; and that as without his sanction, and indeed warm assistance, General Martin's will cannot be fulfilled, whatever praise and respect may be given to the charitable founder, will, in much greater degree, be reflected on his Majesty, who, after the lapse of so long a period, and notwithstanding the many prejudices against the measure, has from his own

innate philanthropic feeling effected the so-much-wished-for objects.

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“I have, &c.

(Signed) “M. RICKETTS, Resident.

“Lucknow Residency, 19 May, 1827.”

The second letter from the same party to Mr. Stirling was in these terms:

“SIR,

“I have now the honour to acknowledge the receipt of your letter of 30th May last, enclosing copy *of a letter from the Master of the Supreme Court, and to forward a copy and translation of a letter just received from the King of Oude, after several personal and written applications on the subject to him, relative to the charities proposed to be established within his Majesty's dominions, under the will of the late General Martin. The King of Oude is far from being anxious for the establishment of these charities, and declines altogether to receive the sum proposed for the liberation of debtors, under the plea, that those in confinement are principally for the crimes of theft and murder; but his Majesty makes no objection to the establishment of the college within the precincts of Constantia House, though he holds out no expectation of encouraging this so charitable and beneficial an institution by his countenance and support.

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“I have, &c.

(Signed) “M. RICKETTS, Resident.

“Lucknow Residency, 4th Sept. 1828.”

The enclosed letter of the King of Oude was dated 21st Suffer 1244 (3rd Sept. 1828), to the address of M. Ricketts, Esq., Resident at Lucknow, and was as follows:

“I have received your letter of 23 Zeehijjah 1243, Hijée (7th July, 1828), and official note of the 13th Tuffer 1244, H. (26th August), on the subject of carrying into effect the charities of the late General Martin, and establishing a college, agreeably to his will, and in conformity to the instructions of the Honourable the Governor-General in Council.

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"The case is, that the prisoners in Lucknow are in most instances confined for theft and murder; consequently, *their release is impracticable; but I have no objection to allow the establishment of a college within the precincts of Constantia House."

Two exceptions were taken to this report on behalf of the appellant, the Mayor of Lyons: first, that the Master had found the testator domiciled at Lucknow; whereas, as a military officer continuing in the service of the East India Company, he had acquired and retained the domicile of a British subject; and secondly, because he had not found whether the intentions of the testator as to the college at Lucknow could be carried into effect. On the 1st March, 1830, these exceptions were allowed; and on the 19th July, 1830, the Master made his amended report, by which, amongst other things, he found that the sum of 2,68,500 rupees would be sufficient to appropriate for the payment of the superintendent and other persons directed by the testator to be employed about Constantia House; that he had been unable to ascertain what had been received by Louis Martin, but that, by the admission of the parties, the legacies had been paid by him, of which a list was annexed, amounting to 1,85,000 rupees, or about 23,125*l.*; that there was no evidence adduced by which he could report who were the five poorest relations of the testator, or who was his heir-at-law, or his heir-at-law by the English law; and with reference to the domicile of the testator, he reported that he was a Frenchman by birth; and he also reported at considerable length the circumstances of his entering the military service of the East India Company and Nabob of Oude, and of his residence at Lucknow. And he further reported, that the legacies and charitable bequests, except the one to Pierre Martin, which *had lapsed, had been paid, and that there was then in the hands of the Accountant-General, to the credit of the cause, sicca rupees 17,51,158. 11. 10; from which, if the several sums set out in detail to be appropriated for the keeping up the establishment and college at Constantia House, for the liberation of prisoners, and for other purposes, in obedience to the testator's will, were deducted, there would remain a residue of rupees 3,48,797. 9. 10; but if the Court

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should be of opinion that the will was duly executed so as to pass real estates at Calcutta, the further sum of 2,48,400 sicca rupees must be deducted from the sum, so as to leave an ultimate sum of rupees 1,00,897. 9. 10.

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On the 4th of November, 1830, the three consolidated causes came on for hearing on further directions, and they were argued on that and several following days. The Court took time to consider its judgment, which it delivered on the 7th of February, 1831. Two sets of Minutes of this decree were afterwards delivered out by the Registrar of the Supreme Court: no decree was, however, drawn up from them; and two petitions for a re-hearing were presented, one by the appellant, the Mayor of Lyons, and the other by the appellants the next of kin of the testator.

The three consolidated causes were accordingly re-heard, together with the cross cause of *Palmer v. Martin*, which was heard on bill and answers, on the 8th and several following days in July, 1831. No judgment was then pronounced, but the causes were on the 25th of July ordered to stand over, and a reference was directed to the Master to inquire whether the Governor-General in Council had the means of giving effect to the charitable intention and directions in the said will mentioned, respecting the *testator's tomb and Constantia House, in case the Court should decree the funds which might be applicable under the will to be placed at the disposal of the Governor-General in Council, or of any person or persons, duly authorized, and appointed by the Governor-General in Council to receive the same, and whether the Governor-General in Council was willing and would consent to receive and appoint any person or persons, in Calcutta to receive the funds, or the interest arising thereon, for the purposes aforesaid.

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On the 5th of November, 1831, the Master made his report, by which he found that the Governor-General was willing to receive and apply such sums as the Court might decide to be applicable to the Lucknow bequest of General Claude Martin; and he annexed a copy of the correspondence between the attorney to the East India Company, and the Secretary to the Government to his report [by which the Governor-General

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authorized an assurance to be conveyed to the Supreme Court, that the services of the British officers at Lucknow would always be available to superintend any public establishment, which the Court might adjudge to be required, for the execution of the will of General Claude Martin, and to control the appropriation of any funds or allowances which might be assigned by the Court for that purpose].

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The Report of the Master was confirmed by an order of Court on the 29th November, 1831.

On the 23rd February, 1832, the Court made its decree in all the four causes. The principal parts of this decree, which was divided into nineteen articles, were, that the Court found in the second article, that the testator, General Martin, was, at the time of his death, an alien, who had acquired an English domicile, during his service under the United Company and the British Government in India, which domicile he retained at the time of his death. In the third article, it found, that the testator, at the time of his death, had no relations by the whole blood, nor any heir-at-law, according to the English law. In the fourth article it found the different persons who were his next of kin, according to the law of England.

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In the fifth article the Court declared, that the will was duly executed in the presence of three credible witnesses, in such manner as would be sufficient, according to the English law, to pass real estates; but that the testator having been by birth a subject of the King of France, and at the time of his death an alien, his lands and houses at Calcutta (except his interest in the Chaud-Paul-Ghaut House, which was *held by him as mortgagee, and which had been declared to be personal estate by the decree of the 2nd December, 1822) did not pass by his will; but that there were not proper parties to the suits, nor sufficient evidence before the Court, as to the lands or houses, or other immoveable property, situate beyond the boundaries at Calcutta, but in places which at the time of the death of the testator were within the Presidency of Fort William, or some of the provinces subject to or forming part of the Presidency, to enable the Court to determine whether the same could or did pass by the will; and as the Attorney-General was not resident within the jurisdiction of the

Court, there was no party to the suit who had made any claim to the lands and houses, or other real or immoveable property; and on the part of the Crown it directed the Receiver to receive the rents and profits of the said immoveable property, both within Calcutta as out of it, in the Presidency of Fort William, and to pay the same into the hands of the Accountant-General of the Court.

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The decree then proceeded, in the sixth article, to give directions, that the amount of the rents and profits of such immoveable estate, together with the accumulations thereon, should be carried to a separate account, to abide any claim which might thereafter be made on behalf of the Crown; and that the future rents and profits and produce of sales of such immoveable property, should be carried to the same account.

In the seventh article the Court declared, that the intent and meaning of the testator was, that the payment of his debts and legacies should first be made, and a sufficient sum set apart and secured for the payment of the several pensions, and for the completing *and maintaining of the several buildings, charitable institutions, and establishments in the will mentioned, or so many of them as could be lawfully and effectually established and maintained; and for the payment of all salaries, wages, and allowances in the will provided, for supervisors, servants, and other persons to be employed in and about the buildings, institutions, and establishments, or any of them; and that after making such payments and provisions, if it should be found, that the sum remaining would exceed ten lacs of rupees, the whole of such surplus should be divided into three equal portions, which should be respectively appropriated and applied, as far as they could lawfully be applied, to the same charitable institutions, establishments, and uses at Calcutta, Lyons, and Lucknow, to which certain other sums were bequeathed, and made applicable by the preceding provisions of the will; and if it should be found that the sum so remaining as aforesaid, after making all such payments and provisions as aforesaid, should be less than ten lacs, then the whole should be divided, and applied in the same way and for the same purposes as it had been stated it was the intention of the testator, in the aforementioned cases, that the

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surplus, if it should at first exceed ten lacs, should be divided and applied.

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In the eighth article the Court declared, that the legacy to Pierre Martin had lapsed; that all other legacies, except the pensions, salaries, and allowances, had been paid and satisfied; and that 1,50,000 sicca rupees, bequeathed by the 23rd article of the will for the poor of Calcutta, Lucknow, and Chandernagore, and a further sum to provide for the payment annually of the 5,000 and 1,000 sicca rupees directed by the 28th article of the will to be paid for the release of *prisoners for debt at Calcutta, had been paid by John Palmer, under an order of the Court, into the hands of the Accountant-General of the Court, in a cause in which Ralph Uvedale, Esq., the Clerk of the Crown, at the relation of Thomas Christenson, was the informant, and John Palmer and others defendants.

In the ninth article the Court declared, that sicca rupees 3,12,090. 7. 8. had been set aside for the payment of pensions at Lucknow.

In the tenth article it declared, that a fund had been set apart for a charitable institution at Calcutta, which, on the 31st December, 1830, amounted, with the accumulations, but after deducting the purchase-money of certain lands for the purpose, to sicca rupees 8,82,856. 1. 7.

In the eleventh article it declared, that the 2,50,000 sicca rupees bequeathed for a charitable institution at Lyons, together with all interest on it, and a sum sufficient to satisfy the bequest of 4,000 sicca rupees to be paid annually for the liberation of prisoners there, had been fully paid and satisfied.

In the twelfth article the Court declared, that large sums had been retained by the executor, residing at Lucknow, for the purpose of being applied in the making the tomb, building, garden and establishments, directed by the will of the testator.

In the thirteenth article the Court declared, that the form of Government of Lucknow, and the circumstances of the country, made it impossible that any effect should be given to the bequest of sicca rupees 4,000, directed to be paid annually for the liberation of prisoners at Lucknow, in the 33rd article of the will, and that such bequest was consequently void; and that

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the Court was consequently incompetent and unable by itself to give effect to the *other bequests for charitable establishments and institutions at Lucknow, which is a place beyond the limits of the jurisdiction of the Court, and not forming any part of the Presidency of Fort William in Bengal; but that the Governor-General in Council of Fort William, in Bengal, had the means, and was able to give effect to the same, and that the same ought to be carried into effect; and that it appeared by the report of the Master, under an order made in these causes on the 25th July, 1831, and which report is dated the 5th day of November, 1831, that the Governor-General in Council was willing to receive and apply such sums as this Court might decide to be lawfully applicable for those purposes. And for-as-much as the testator, Claude Martin, in and by the 33rd article of his said will, had expressed his desire and intention, that in case it should be necessary the protection and assistance of the Government should be obtained, for the purpose of giving effect to the said last-mentioned bequests and testamentary dispositions, the Court did further agree and declare, that if the whole sum of sicca rupees 2,00,000, bequeathed in the 33rd article of the will of the testator, Claude Martin, for the finishing the house of Constantia, had not been expended and applied for that purpose, whatever might remain thereof ought to be set apart from the funds then standing to the general credit of these causes, and applied as a building and repairing fund for the house and establishment at Constantia, and ought for that purpose to be paid to the Governor-General in Council, or to some person duly nominated and appointed by the Governor-General in Council to receive the same; and that out of the same funds standing to the general credit of these causes, a further sum *of sicca rupees 1,00,000 for the support of a college and school at Lucknow, bequeathed in the 33rd article of the will, together with accumulations of interest on the same from the death of the testator until the setting apart of the same, ought also to be set apart, and the interest thereof from time to time, as the same shall accrue and be received, ought to be paid to the Governor-General in Council, or to some person whom the Governor-General in Council, for the time being, shall duly nominate and appoint to receive the same,

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in order that the same may be applied to the purposes in the 93rd article of the will mentioned; and that out of the fund standing to the general credit of these causes, the further sum of three lacs of rupees ought to be set apart, and the interest thereof paid to the Governor-General in Council, or to such person or persons as the Governor-General in Council shall nominate and appoint, in order that there may always be allowed and paid the salaries and allowances for supervisors, servants, and other attendants and persons to be employed in and about the tomb, buildings and establishments at Constantia, in the will mentioned (which the decree then recapitulated) amounting in the whole to the sum annually of sicca rupees 12,228; and the Court then proceeded to direct the payment of any sum of money which had been expended in the necessary care and superintendence of the establishment at Constantia, under the directions or authority of the Master or Accountant-General of the Court.

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By the fourteenth article, it was referred to the Master to inquire, what part of the funds in the cause had arisen from the rents, profits, or interest thereon, of the lands or houses situate in Calcutta (with the exception of the house Chaud-Paul-Ghaut), *and also what houses, lands, or other real immoveable property, beyond the boundaries of Calcutta, but within the Presidency of Fort William, were in the hands of the testator at the time of his death, and what was the nature of the tenure thereof, and the estate and interest of the testator therein, and what regulations and usages have prevailed, and now prevail, in the said provinces beyond the boundaries of Calcutta, as to the right and power of European aliens to devise or bequeath by will any lands, houses, or other real immoveable property of which they may be possessed at the time of their death within the provinces, and all further inquiries as to whether any such immoveable property had been sold, and what part of it the Receiver-General of the Court was in possession of, and the amount of the rents and profits received, and the proceeds of the sales.

By the fifteenth article, the Master was directed to inquire, whether the sums paid to the Accountant-General in the case of *Uvedale v. Palmer* were sufficient to provide for the charitable bequests and purposes for which they were directed to be set

apart and paid, or what further sum might be required, to be retained and set apart for that purpose.

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By the sixteenth article, the Master was directed to inquire, what pensioners of the said testator's were then living; and whether any part of the 3,11,300 sicca rupees, as had been set apart for the payments of such pensions, might be transferred back to the funds standing to the general credit of the cause; and to state some plan by which the payments might be conducted, so as to prevent all frauds, and provide for a gradual transfer back of the whole to the general credit of the causes as the pensioners should die.

By the seventeenth article, the Master was directed to inquire, whether the whole 2,00,000 sicca rupees, allowed by the 33rd article of the will, had been applied to that purpose, and what sum would be sufficient to satisfy the bequest of sicca rupees 1,00,000 for the establishment at Lucknow in the 33rd article of the will mentioned, together with the accumulations of interest thereon from the testator's death; and also to inquire whether any sums were due to persons employed about the said establishment.

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By the eighteenth article, the Master was directed to inquire and report, what surplus remained out of the funds standing in the general credit of the cause, after making provision for all the payments, reservations and appropriations to separate accounts, and other matters and things, by this decree ordered and directed.

The nineteenth article contains the usual directions as to the taking of the accounts, that all parties should be allowed their costs as between attorney and client, and reserved further directions.

On the 20th of August, 1832, the appellants presented separate petitions to the Supreme Court for leave to appeal from the above decree to his Majesty in Council, which was duly granted, by an order made on the 9th of December, 1833; in pursuance of which two petitions of appeal were lodged against the decree, one by the Mayor of Lyons, and the other by Christophe Martin, Marie Desgranges Martin, Pierre Ballofett and Claudine his wife, and François Martin.

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Pending the proceedings before the Supreme Court, an agreement was entered into at Lyons, between the Baron Rambaud, the then Mayor of the city, acting *and stipulating in behalf of the city, of the one part, and the next of kin of General Martin of the other, whereby it was agreed, that as well the sums that the city of Lyons, as the next of kin of the testator, might be ultimately decreed entitled to, arising from the real or personal estate of the testator, should form one common fund ; and that after raising and paying thereout to the Mayor of Lyons the sum therein mentioned, towards defraying the charges of recovering, and remitting from India, the legacies given for the benefit of the city, and already received from India, the common fund so created should be divided into five parts, whereof four-fifths should be taken by the next of kin, to be divided between them according to the respective rights of each, and the remaining one-fifth by the city of Lyons ; and the parties thereto did agree, that the right in which they contracted, comprised all sums whatever which should constitute the residue of the succession of Major-General Claude Martin, as well any residue less or greater than 100,000*l.* sterling, and likewise the 100,000*l.* sterling itself, or the ten lacs of rupees mentioned in the 33rd article of the will, in such manner that the division of the residue should be made in the proportion before mentioned, whether that residue be decreed in the whole or in part to the next of kin, or whether in the whole or in part to the city of Lyons, and the establishments in the same class with it, or whether it should be in an equal or unequal portion to the next of kin, to the city, and to the other establishments ; and it was declared, that the agreement should not be executory until it should have obtained the approbation of the Municipal Council of the city of *Lyons, of the Prefect, and the sanction of the King of France ; which was afterwards expressed by a royal ordinance of the late King Charles the Tenth.

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In consequence of the above agreement and ordinance, the appellants presented a petition to his Majesty in Council, praying that the two appeals might be consolidated and heard together, and that one case might be delivered in jointly by the appellants ; which, upon the consent of the Attorney-General (who claimed

an interest for the Crown), and the counsel for the East India Company, was directed.

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The appellants submitted by their petition of appeal, that the decree or decretal order of 25th of July, 1831, and the order of the 29th November, 1831, confirming the report of the 5th November, 1831, and also the decree of the 23rd February, 1832, were erroneous, and ought to be reversed or altered, for the following amongst other reasons :

Because the decree of the Supreme Court of 2nd December, 1822, having declared that the real estate of the testator situate in the town of Calcutta was of the nature of freehold estate, and that the heir-at-law of the testator, according to the law of England, was entitled thereto, and to the rents and profits thereof, (if it should be found that the testator's will was not duly executed so as to pass real estate, according to the Statute of Frauds,) it was not competent to the Supreme Court to reverse its own decree of 2nd December, 1822, by another decree of 23rd February, 1832, and on the suggestion of the Court itself, and not upon any claim or suggestion made by any of the parties to the suits, and to declare, in effect, that *the testator being at his death an alien, the real estate in Calcutta had devolved on his Majesty, in virtue of his prerogative royal.

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Because such declaration is contrary to law ; for that the law of alienage, whereby real estate situate in this country, possessed by aliens, becomes forfeited to the Crown, forms no part of the laws of this country adopted in any of our possessions in India.

And because the decree of 23rd February, 1832, ought to have declared that the real estate passed by the testator's will, and was thereby devised with and formed part of the general residue of the testator's estate.

Because the third declaration or provision in the decree of 23rd February, 1832, that the testator, at the time of his death, had no relations of the whole blood, nor any heir-at-law, according to the English law, was not founded on any evidence taken in the causes, and is contrary to the fact, the testator having at his death a first cousin resident at Lyons, in France,

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he being the only son of the eldest brother of the whole blood to the testator's father, and the heir of the testator by the English law.

Because the true construction of the testator's will, as to the bequests contained therein, relating to the establishment of the college for charitable purposes at Lucknow, is, that such charitable bequests have failed for the reasons stated in the decree of 23rd February, 1832, viz., "that the form of the Government of Lucknow, and the circumstances of that country, make it impossible that any effect should be given to the bequest for *liberation of prisoners at Lucknow; and that the Supreme Court is incompetent and unable by itself to give effect to the other bequests for charitable establishments and institutions at Lucknow, which is a place beyond the limits of the jurisdiction of the Court, and not forming any part of the Presidency of Fort William in Bengal," and the Supreme Court had not power to direct the payment of any funds for the purposes of the Lucknow college to the Governor-General in Council; but that, upon the same charities not being capable of being carried into execution, from any cause whatever, the right of the next of kin, and heir or heirs respectively, of the testator, thereupon accrued to the sums, and property given for such purposes, as being undisposed of by the testator's will.

Because the true construction of the testator's will, as to the disposition of the residue, is, that if, after payment of his debts and legacies, the residue (including in such residue as well the real, as the personal estate), exceed 100,000*l.* sterling, or about ten lacs of sicca rupees, the sum of ten lacs is to be applied, as to one-third thereof, in increase of the charitable institutions directed by the will to be established at Lyons, and one other third in increase of the charitable institutions directed by the will to be established at Calcutta, and as to the remaining one-third thereof, given by the will for increasing the charitable institutions at Lucknow, the bequest thereof has failed; and that such part of the last-mentioned one-third as consists of or has arisen from the personal estate, is distributable amongst the next of kin of the testator; and such

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part thereof as has arisen from the real estate, *amongst the heir or heirs of the testator, according to the laws of the country, where such real estate is situate; and also, that any residue there may be of the testator's real and personal estates, not amounting to, or any there may be exceeding, the said sum of ten lacs of sicca rupees, is by the will undisposed of, and ought in the like manner, as to such part thereof as consists of personalty, to be distributed amongst the testator's next of kin, and as to such part thereof as consists of real estate, amongst the heir or heirs of the testator, according to the law of the country, where such real estate is situate.

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Because the reference to the Master, by the order made on the re-hearing of the causes on the 25th July, 1831, and the Master's report of 5th November, 1831, made in pursuance of the same order, was altogether an irregular proceeding; and that the same report ought not to have been acted on by the Supreme Court, having been made not only against law, because the Supreme Court has no power to direct payment of any part of the testator's funds to the Governor-General in Council, but also without evidence duly taken; and, moreover, directly against the finding in the Master's amended report of 19th July, 1830, made in pursuance of the decree of 2nd December, 1822 (and which report was duly confirmed), in which report it is found, that the establishment of the college at Constantia, and the bequest of 4,000 sicca rupees per annum for the liberation of debtors at Lucknow, could not, with reference to the intention of the testator, and the sanction and disposition of the Government at Lucknow, be carried into effect; such amended report having been made in pursuance *of an order of 1st March, 1830, allowing exceptions to the former report of the Master of 3rd February, 1830, finding that he had not before him sufficient evidence to decide that point.

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Because the sum of three lacs of sicca rupees, directed by the decree of 23rd February, 1830, to be set apart for payment of the 12,228 sicca rupees per annum, for salaries to attendants employed about the tomb, buildings and establishment at Constantia, is, even supposing the college capable

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of being established, an excessive sum, as it would yield, at five per cent. (the present rate of interest of the Indian Government securities), 15,000 sicca rupees per annum.

Because it is stated in the decree of the 23rd February, 1832, that all the legacies given by the will, save the annuities and pensions, have been fully paid and satisfied; the legacies given by the testator's will, for the benefit of the poor of Calcutta, Chandernagore and Lucknow, and for the relief of prisoners for debt, at Calcutta, having been before 1822, paid by John Palmer, one of the executors of the testator's will, into the hands of the Accountant-General of the Supreme Court, in the cause or information of Ralph Uvedale, Clerk of the Crown, at the relation of Thomas Christenson against John Palmer and others; and therefore the subsequent inquiry directed in the same decree, whether the sums so paid were sufficient, and what further sum might be required, is contradictory, and ought not to have been directed; and more especially as no similar direction is made by the decree with respect to the legacies given for charitable purposes at Lyons.

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Because the decree of 23rd February, 1832, does not declare that the sum of sicca rupees, 3,12,090. 7. 8., directed to be set apart to the credit of a separate account in the books of the Accountant-General for payment of the annuities and pensions, belongs, on the death of the annuitants and pensioners, to the next of kin of the testator; the same not being disposed of by the testator's will.

Because inquiries being directed by the decree of 23rd February, 1832, as to what real or immoveable property the testator held at his death, situate beyond the boundaries of Calcutta, but within the Presidency of Fort William, or the provinces subject to, or forming part of, the said Presidency, and also as to the tenure thereof, and the testator's interest therein, and his power to dispose thereof by his will, and respecting the rents thereof, and the accumulations of the same; an inquiry ought also to have been directed, as to who is or are entitled to the real or immoveable property, and rents and accumulations, subject to the testator's power of disposition over the same.

Because, it appearing by the testator's will, and the pleadings in the causes, that the testator had houses, lands, and other real property or immoveable property, not within the Presidency of Fort William, or the provinces subject thereto,—for instance, at Lucknow, where the Mahomedan law prevails, and elsewhere, the decree ought to have directed the like inquiries in all respects, so far as necessary, respecting such houses, lands, and real and immoveable property,—the tenure thereof, and the estate and interest of the testator therein,—the regulations and usages respecting the right and *power to devise and bequeath the same, the particulars of the rents thereof, and who has received the same since the testator's death, and respecting the accumulations thereof, and also as to who is or are entitled to the same real or immoveable property, subject to the testator's power of disposition thereof by his will, as by the same decree were and ought to have been directed respecting the testator's real and immoveable property beyond the boundaries of Calcutta, but within the Presidency of Fort William, or the provinces subject to or forming part of that Presidency.

Because, it being found by the Master's report of the 3rd February, 1830, that the Mahomedan law makes no distinction between heirs and next of kin, the real or immoveable property situate in such countries, where the Mahomedan law is the law of the country, is to be considered as personal estate, subject to all the provisions of the testator's will, and the same ought to have been so decreed accordingly; and because, as to all the testator's houses and lands, and real and immoveable property, as well in as out of Calcutta, the same being, as appellants are advised, in fact, lawfully devised by the testator, the Court should have decreed and provided that, subject to the specific devises, bequests, and directions contained in the will, all the testator's real and personal estates, wherever situate, should, according to the respective values thereof, bear a due proportion of his legacies, charitable and others; and the decree should also have provided that all the estates should bear a due proportion of the costs of the suits, and the proceedings in the same, or at least of some portion

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of *such costs, or at least, and so far as the apportionment could not then be made, the decree should have contained proper reservations, with a view to such ultimate apportionment of the legacies and costs, subject to the inquiries directed, or which ought to have been directed, respecting the testator's real and immoveable property beyond the boundaries of Calcutta.

On the part of the respondents, the East India Company, it was suggested, that in the event of its being holden that any part of General Martin's estate did not pass under his will, on account of his being an alien, or otherwise, very important questions would arise, which, regard being had to the state of proceedings in the Court below, could not there be properly raised or decided; and the respondents further suggested, that in case any charitable bequests in the will could not be executed in the manner pointed out by the testator, the same would be to be disposed of by the respondents; and they submitted, that the decree of the 23rd February, 1832, ought, so far as it affected the charities at Calcutta and Lucknow, to be affirmed, for the following amongst other reasons:

Because the bequests for distribution of alms to the poor, and the liberation of poor prisoners for debt at Calcutta, were valid bequests, and it was the duty of the Supreme Court, in the suits for the general administration of assets of the testator, to inquire whether sufficient sums had been applied out of his assets for securing payment of those bequests.

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Because the bequest for the purpose of establishing a college at Lucknow, was a valid bequest, and ought to be carried into execution; and the mode adopted by the Supreme Court to carry it into effect was strictly regular and proper.

On behalf of the Crown, it was insisted (among other reasons) that his Majesty was entitled to all the lands, tenements and hereditaments, situate within the town of Calcutta, or the Presidencies of Fort William, or provinces subject thereto, of which the testator, Claude Martin, an alien, died seised or possessed, by virtue of the Royal prerogative.

That his Majesty was entitled to the 4,000 sicca rupees

directed to be paid annually for the liberation of prisoners at Lucknow, the said bequest having been decreed to be void; the said 4,000 sicca rupees per annum to be disposed of by his Majesty to such charitable purposes as he shall be advised.

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Mr. Tinney, K. C., and Mr. Pemberton, K. C., for the appellants.

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Mr. Serjeant Spankie, and Mr. E. J. Lloyd, for the East India Company:

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* * The population of Calcutta is the most mixed of any in the world, Portuguese, French, Armenians, besides natives; most of whom would be aliens under the laws of England, and yet have been accustomed to transfer lands, the title to which is now become insecure by reason of the new decisions of the Supreme Court. It is admitted, on all hands, that if the English law of alienage applies to lands in the East Indies, it must operate in this case. The only question, *therefore, is, whether that law has been introduced. The principles which govern the establishment of English law in our colonies are to be found in Lord MANSFIELD's judgment in *Campbell v. Hall* (1), and in Chalmer's Opinions (2); and the whole question must turn upon how much of the English law has been introduced into Calcutta. This must depend upon the force and effect of the charters, which have at various times been given to the East India Company.

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The Attorney-General (Sir John Campbell) and the Solicitor-General (Sir Robert Monsey Rolfe) for the Crown :

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The Attorney-General :

The only question we feel it necessary to argue on behalf of the Crown, is that which is placed first on the case submitted by our predecessors in office, respecting the effect of the testator, General Martin, being an alien, and incapable of holding lands;

(1) Cowp. 204; Lofft, 655.

(2) 1 vol. 244.

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and the proposition which I shall submit to the Court, on behalf of his Majesty, is, that the sovereignty of the territories held by the East India Company is in the Crown of England, and that, by virtue of that sovereignty, upon the death of General Martin, the real property of which he was possessed escheated to the Crown.

[*257] The importance of this question, though overrated as far as respects this individual case of the appellants, is considerable; for though the Crown would, in case your Lordships shall affirm my proposition, in all probability *be advised to grant these estates for the carrying into effect the general intentions of the will, so far as such intentions are capable of being performed; yet, inasmuch as very large possessions are held in India by aliens, it will be necessary, should the decision of the Supreme Court be upheld, to make some immediate legislative provision, against the inconvenience which would otherwise ensue.

Now we submit, that the Crown could not have taken possession of General Martin's estate, he being an alien, during his lifetime, without office found, yet that, on his death, they revert absolutely to the Crown, and cannot descend to his heir.

* * * *

[266] *Mr. Tinney*, in reply :

The inconvenience of applying the laws respecting aliens to the East Indies is admitted on all hands; but the law officers of the Crown say, it can be remedied by the Crown granting the funds, in this particular case, to the objects contemplated by General Martin in his will, and preventing, by legislative enactment, a similar inconvenience occurring again; and they hold out a reasonable expectation that that course will be adopted here, if your Lordships shall, in this respect, affirm the decision of the Court below.

[*267] However satisfactory to the parties such a promise may be, it is better to have the limits of this branch of law well defined, for it is impossible to say in what *cases it may not be made applicable, if allowed here. It is admitted that the rule cannot extend beyond the lands in Calcutta and the Mofussil; the lands, therefore, in Lucknow, are not affected by it.

No authority of any kind has been produced, to shew that the escheat to the Crown, in the case of alienage, is any other than a rule of municipal law. If it were otherwise, it would prevail in other countries than England; in the Canadas, therefore, it might be expected; but there the old French law, the *Droit d'Aubaine*, which repudiates our law of alienage, prevails; and though, at his death, the lands of an alien go to the Crown, yet he can hold them during his life.

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LORD BROUGHAM :

1837.
Feb. 22.

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The first, and by far the most important, question, brought before us in this case, is, whether or not the testator, being an alien, could devise his real property? in other words, whether or not that portion of the English law which incapacitates aliens from holding real estate to their own use, and transmitting it by descent or devise, extends to Calcutta, and to the Mofussil?

As the argument for its extending to Calcutta is very much stronger than that for its extending to the Mofussil, it may be well to consider the former in the first place.

It is agreed, on all hands, that a foreign settlement obtained in an inhabited country, by conquest, or by cession from another power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling, an uninhabited country.

In the latter case it is said, that the subjects of the Crown carry with them the laws of England, there being, of course, no *lex loci*; in the former case it is allowed, that the law of the country continues until the Crown, or the Legislature changes it. This distinction, to this extent, is taken in all the books; it is one of the six propositions stated in *Campbell v. Hall*, *as quite clear, and no matter of controversy in the case; and it had been laid down in *Calvin's case*; in *Dutton v. Howell* (1); in *Blankard v. Gadd Salk*, by Lord HOLR, delivering the judgment of the Court; and no where more distinctly and accurately than in the decision of this Court. Two limitations of this proposition are added, to which it may be material that we should attend.

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(1) Shower, P. C. 24.

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One of these refers to conquests, or cessions: In *Calvin's* case an exception is made of infidel countries; for which it is said, in *Dutton v. Howell*, that though Lord Coke gives no authority, yet it must be admitted as being consonant to reason. But this is treated in terms as an "absurdity" by the Court in *Campbell v. Hall*. The other limitation refers to new plantations: Mr. Justice Blackstone (1), says, that only so much of the English law is carried into them by the settlers as is applicable to their situation, and to the condition of an infant colony. And Sir WILLIAM GRANT, in *Attorney-General v. Stewart* (2), applies the same exception even to the case of conquered or ceded territories, into which the English law of property has been generally introduced. Upon this ground, he held that the Statute of Mortmain does not extend to the colonies governed by the English law, unless it has been expressly introduced there, because it had its origin in a policy peculiarly adapted to the circumstances of the mother country.

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Then, is Calcutta to be considered as an uninhabited district, settled by English subjects, or as an inhabited district, obtained by conquest or cession? *If it falls within the latter description, has the English law incapacitating aliens ever been introduced? If that law has never been introduced, has there been such an introduction of the English law generally, that those parts which have been introduced, draw along with them the law touching aliens? An answer to these three questions, if it do not exhaust the argument, seems to carry us sufficiently near to the conclusion at which we seek to arrive, and it will include a consideration of the only reason for the proposition upon which the judgment below is mainly rested, viz. that the Royal prerogative extends necessarily and immediately to all acquisitions, however made, and that the forfeiture of aliens' real estate is parcel of that prerogative.

I. The district on which Calcutta is built, was obtained by purchase from the Nabob of Bengal, the Emperor of Hindostan's lieutenant, at the very end of the 17th century. The Company had been struggling for nearly 100 years to obtain a footing in Bengal, and till 1696 they never had more than a factory here

(1) Bl. Com. 106.

(2) 16 R. R. at pp. 164, 165 (2 Mer. 161).

and there, as the French, Danes, and Dutch also had. Till 1678 their whole object was to obtain the power of trading, and it was only then that they secured it, by a firman from the Emperor. From that year till 1696 they in vain applied to the Native Government for leave to fortify their factory on the Hoogly, and it was only then that they made a fortification, acting upon a kind of half consent, given in an equivocal answer of the Nabob. Encouraged by the protection which they were thus enabled to afford the natives, many of them built houses, as well as the English subjects; and when the Nabob, on this account, was about to send a cady or judge, *to administer justice to those natives, the Company's servants bribed him, to abstain from this proceeding. Some years afterwards, the Company obtained a grant of more land and villages from the Emperor, with renewed permission to fortify their factories. During all this period, tribute was paid to the Emperor, or his officer the Nabob, first for leave to trade, afterwards as Zemindars under the Emperor; and in 1757, the year memorable for the battle of Plassey, the treaty with Jaffier Ally, indemnifying them for their losses, ceding the French possessions, and securing their rights and binding them to pay their revenues like other "Zemindars." Eight years later they received likewise, from the Native Government, a grant from the Dewanny or Receiver-ship of Bengal, Bahar, and Orissa; and of their subsequent progress in power it is unnecessary to speak. Enough has been said to shew that the settlement of the Company in Bengal was effected by leave of a regularly-established Government, in possession of the country, invested with the rights of sovereignty, and exercising its powers; that by permission of that Government, Calcutta was founded, and the factory fortified, in a district purchased from the owners of the soil, by permission of that Government, and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising by delegation a part of its administrative authority. At what precise time, and by what steps, they exchanged the character of subject for that of sovereign, or rather acquired by themselves, or with the help of the Crown, and for the Crown, the rights of sovereignty, cannot be ascertained. The

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sovereignty has long since been vested in the Crown ; and though it was at first recognised *in terms by the Legislature in 1813, the Act 53 Geo. III. c. 155, s. 95, is declaratory, and refers to the sovereignty as “undoubted,” and as residing in the Crown. But it is equally certain that, for a long period of time after the first acquisition, no such rights were claimed, nor any of the acts of sovereignty exercised, and that during all that time no English authority existed there which could affect the land, nor bind any but English subjects. The Company and its servants were then in the situation of the Smyrna or the Lisbon factories at the present time.

II. The next question is, has the English law incapacitating aliens ever been introduced ? It follows from what has been observed, not only that Calcutta was a district acquired in a country peopled, and having a government of its own, but that for a long course of time no such law as that which incapacitates aliens could be introduced, any more than it could now be introduced into such part of the Asiatic, or Portuguese territory as those factories may occupy. But even where the sovereignty rested in the Crown, there is every argument of probability against a law being introduced so inapplicable to the circumstances of the settlement. Sir WILLIAM GRANT’S reasons for confining the Mortmain Act to England have a manifest application to this case ; for though they are mainly drawn from the provisions of that Act being adapted to the peculiar circumstances of the mother country, they plainly proceed upon the assumption, that the intention of the Legislature to confine the operation of the Act may be gathered from thence ; and it should seem that such intention is even more directly to be gathered from the fact, that the provisions in question *are manifestly inapplicable to the circumstances of the settlement. At whatever time the sovereignty was acquired, and the power of introducing the Alien Law became vested in the Crown, the real property in Calcutta must have been held indiscriminately by subjects and foreigners. The sudden application of such a law, is in the highest degree improbable, because it would work great inconvenience and grievous injustice. But if the sovereignty was gradually acquired, if the transition of the Company from the state of subjects under the Mogul, to an independent authority,

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was slowly made, by imperceptible steps, the introduction of the Alien Law became still more improbable, for no act could then be done by the party obtaining the dominion, nor any stipulation made by the party becoming subjects, to secure the rights of the one or restrain the power of the other. This may always be done where a conquest or cession at once vests the sovereignty of a district in one state, which had previously belonged to another. The treaty may ascertain, and almost always does ascertain, the relative rights of the parties as to the property of the country. But in the present case no such definition could possibly take place, and this exceedingly increases the improbability of such a law having been introduced at all.

Nor does the argument rest here; the well-known facts are wholly inconsistent with the supposition that this law ever was in operation; and the acts of the sovereign power, the legislative acts of the Crown, and of those to whom its authority is delegated, and the Acts of the Parliament itself, plainly proceed upon the footing of this law never having extended to Bengal.

The facts must, of necessity, be numerous, and of constant occurrence, for every foreigner holding a house by lease, or by freehold tenure, affords an instance of the law not being in operation; and no instance has been produced, indeed it is agreed on all hands that no instance has ever existed, of a forfeiture to the Crown for this cause. There is no such thing known in those parts as an inquisition of office, or any analogous proceeding, or any proceeding whatever for entitling the Crown, or those exercising its delegated authority, to the real estate, or the chattels real, of aliens within the district. When those foreigners die, their real estates have descended to their heirs, or been taken by their devisees, or been administered as assets by their executors, without any claim ever having been made by the sovereign power, which would here, in England, have been entitled without any office. Ejectments have been brought, and the parties in possession have never been advised to set up the defence that the lessor of the plaintiff claimed by descent from an alien; and dower has been assigned to widows, alien also. Previous to 1826, which is long after the present proceedings were instituted, and after the first decree in the cause, no mention of

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the subject appears ever to have been made in any place, or in any court of justice. Assuredly, if the law be as is contended, and the Crown by law is entitled, no one can contend that it is too late to declare the law, and enforce the right. But the whole question turns upon this, Has the law in question been introduced? and the non-claim is material to shew that it has not been introduced; because it is not merely the acquiescence of a party, it is the acquiescence of that power which alone possessed the right to introduce the law, and *affords strong proof that this power never had introduced it.

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But the acts of the same power afford positive evidence yet more distinct. The charter of the 13 Geo. I. expressly sets forth that the intention of the Crown is to induce foreigners to settle within the district: "Whereas the East India Company have, by a strict and equal distribution of justice, very much encouraged, not only our own subjects, but likewise the subjects of other provinces, and the natives of the adjacent countries, to resort to and settle in the said towns, factories, and places, especially in Calcutta, Madras, and Bombay;" to enable them the better to administer justice, corporations of mayor and aldermen are constituted, with power to administer justice; and it is expressly provided, that of the nine aldermen, seven shall be natural-born subjects, and two may be subjects of any other province or state, in amity with the Crown; and all of these are to be chosen from the principal inhabitants of the Presidencies. In the successive renewals of this charter, down to the end of Geo. II., the only change in this province is adding the qualification that (of the nine aldermen), the two foreigners shall be Protestants. This charter could hardly have been so worded had the Crown intended that aliens should be incapable of holding lands; and it certainly could never have contained the provision directing two aliens to hold offices of trust under the Crown, or directed all the aldermen, including the aliens, to be chosen out of the principal inhabitants, if the general incapacities of aliens by the English law had been introduced into Bengal. For even if their disqualification to hold office can be traced no higher than the *statute, there can be no argument raised in favour of the introduction of this part of the English law into Calcutta, before

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the statute of 11 & 12 Will. III. c. 44 (1), was passed. Observe too, in what way the supreme authority in Bengal, exercising the delegated powers of sovereignty, regards aliens. And mark if it views them as at all on a different footing from subjects, in respect of rights of property. The Regulation 38, A.D. 1793, was made, as the title states, to enforce the "existing rules against Europeans of any description holding lands, without the sanction of the Governor-General in Council." And the 3rd section enacts, that "No European of whatever nation or description, shall purchase, rent, or occupy, directly or indirectly, any land out of the limits of the town of Calcutta, without the sanction of the Governor-General in Council; and all persons now so holding land beyond the limits of Calcutta, without having obtained such permission, in opposition to the repeated prohibitions of Government, or who may hereafter so purchase, rent, or occupy land, shall be liable to be dispossessed of the land, at the discretion of the Governor-General in Council; nor shall they be entitled to any indemnification for buildings which they may have erected, or other account." No statute made for England could have been so framed. It would have been absurd to prohibit Europeans, "of whatever nation or description," doing that which only one class of Europeans, viz., British subjects, could by law do. The provision of the Bengal Regulation manifestly proceeds upon the assumption, that persons other than subjects, could, but for the prohibition, and the former rules which it is made to enforce, have held lands. It declares that aliens, as well as subjects, shall be liable to be dispossessed *of lands purchased contrary to the enactment; which would have been wholly absurd, if aliens had been liable to be dispossessed upon office found, whether the prohibition had been issued or not. It would be difficult to produce a clearer recognition that the sovereign power did not consider that the Alien Law had ever been introduced into Bengal. But it seems also to admit, that in Calcutta, and notwithstanding the prohibition, foreigners as well as subjects might hold lands without licence, for it confines the prohibition to the Mofussil: "out of Calcutta," are the words.

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The same inference is still more strongly raised by the statute

(1) Qu. 9 & 10 Will. III. c. 44, since repealed.

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9 Geo. IV. c. 38 (1), “for declaring and settling the law respecting the liability of the real estates of British subjects and others, within the jurisdiction of the Supreme Court in India, as assets for the payment of the debts of their deceased owners.” It declares and enacts, that when any British subject shall die seised of, or entitled to, any real estate in houses, lands or hereditaments, or, “wherever any person, not being a Mahomedan or Gentoo, shall die so seised or entitled, then such real estate of such British subject, or other person as aforesaid,” shall be assets. And it afterwards declares that the executor or administrator “of such British subject, or other person entitled to sell and dispose of such real estate, and to convey and assure the same to a purchaser, in as full and effectual a manner as the testator or intestate could or might have done in his lifetime.” Surely this could have no meaning, unless persons other than British subjects—that is, aliens—could by law be seised of, or entitled to, real estate. *And nothing could be more absurd, than to declare that the executors and administrators of aliens, should be entitled to sell the real estates of alien testators or intestates, in as full and effectual a manner in law as the testators or intestates could have done, if those testators or intestates could not in any manner or way have sold, or demised, or in any way have dealt with, such estates. Suppose such an enactment in any statute relating to this country, and see how absurd it would have been. This seems strongly to prove that our law as to aliens was not understood by the Legislature to have been introduced in India before 1828; and yet the earliest of the cases, the only one before the case at Bar, had then been decided at Calcutta.

But it seems to be contended, both here and below, that there is something in the law incapacitating aliens, which makes it, so to speak, of necessary application wheresoever the sovereignty of the Crown is established, as if it were inherent in the nature of sovereign power. To this a sufficient answer has been already afforded, if the acts of the sovereign power to which we have referred shew that no such application to Bengal ever was contemplated, unless direct authority can be produced to shew that this right is inseparable from the sovereignty, and, as it

(1) Rep. with savings, S. L. R. Act, 1873.

were, an essential part of it. Now, there is no intimation of anything of the kind in those cases where the whole subject is discussed most at large, as in *Calvin's* case, where all the doctrines connected, however remotely, with each head of the argument, are broached; Lord HALE's famous judgment in *Collingwood v. Pace* (1), and Lord MANSFIELD's, in *Campbell v. Hall*. But in the absence of any such authority, the distinct recognition *by the sovereign of the capacity of aliens, is itself a strong authority against the position which affirms the title of the Crown to aliens' estate to be inseparable from the sovereignty. At the very least it shews, either that the right in question does not exist, or that it has been waived and removed.

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It should seem, however, independent of these considerations, that there is no warrant in the nature of the thing for the position, that this right is an incident of sovereignty; it certainly is not an incident to sovereignty. In several other countries the sovereign has no such right. In France, for example, aliens can hold lands without entitling the Crown, and can transmit them to their heirs; this was abrogated by Ordonnau, 13th October, 1814; the *droit d'aubaine* having been abolished at the Revolution; and the proviso of reciprocity at the Restoration introduced (provided the law of their own country gives the same right to French subjects then seised of lands). Besides, if reference be made to the prerogative of the English Crown, that prerogative in other particulars is of as high a nature, being given for the same purposes of protecting the State; and it is not contended that these branches are extended to Bengal. Mines of precious metals, treasure-trove, royal fish, are all vested in the Crown, for the purpose of maintaining its power, and enabling it to defend the State. They are not enjoyed by the sovereign in all, or even in most countries, and no one has said that they extend to the East Indian possessions of the British Crown.

III. Can it then be contended that the general introduction of the English law, draws after or with it that branch which relates to aliens? This is the third question proposed, and to this an answer, or the materials *for an answer, have already been

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furnished. For had the negative position only rested upon want of instances where the rights of the Crown had been enforced, it might have been said that the general application of the English laws implied that of the portion in question. But the acts of the power which alone could introduce this portion, and which alone introduced the English laws generally, shew that it was introduced not in all its branches, but with the exception of this portion at the least. This must be admitted, unless it can be maintained that there is no possibility of introducing the English laws at all, without introducing every part of them, which clearly cannot be asserted; for, notwithstanding the extent to which these laws have been introduced, it is allowed on all hands that many parts of them are still unknown in our Indian dominions.

The argument to which we are adverting assumes, that the English laws regulating real property generally have been introduced; and for this position the case of *Freeman v. Fairlie* is cited; but that case only decided, that the estate in lands and tenements of a British subject in Calcutta was of such a nature as to descend to him according to the English law of succession; that it was freehold of inheritance. It is true that this conclusion was reached by the adoption of the larger position, that the English law had been introduced into the settlement; but whatever went beyond the point of the land being freehold of inheritance, was *obiter*, and cannot be said to have been decided. It must further be observed, that the grounds of the more general position were chiefly the practice of the settlement, in regard to the mode of conveyances, viz.

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by lease and release, with the course *of succession, and also the charters of the Company, with the Acts of Parliament referring to them; the charter of the 18th Geo. I. being the one principally cited. Now no one who reads that able judgment can entertain a doubt, that the same learned Judge, had he been called upon to determine whether or not the law extended to alien incapacities, when he found the practice wholly against this extension, without any exception, and when he also found the language of the charters, especially that of 1726, as well as the provisions of the Regulations of 1793, and of the Act passed in 1828, all proceeding upon the supposition of aliens being equally

capable with subjects of holding and of transmitting real property, would have decided against extending and applying to the law of alienage the proposition which he had laid down upon the facts then before him, and upon the branches of the English law connected with the case under his immediate consideration.

If, indeed, the whole English law of real property, or even all its principal provisions, have been introduced into these settlements, an event which must have taken place many years back, how came it to pass that, as late as 1819, there could have been any question made, whether or not wills, to pass real estate, must be witnessed according to the provisions of the Statute of Frauds? Yet it was then, and while *Freeman v. Fairlie* was pending before the same Court, for the first time determined, that those provisions extended to Calcutta,—determined, too, upon a full inquiry into the facts, and examining evidence of persons conversant with the Indian law. And it is plain, from the inquiry which Sir WILLIAM GRANT had directed, and from what Sir THOMAS PLUMER afterwards *says, in giving judgment, that the mere proof of property being fee simple, and inheritable by the English law, was not deemed sufficient, but a further inquiry was directed, whether it passed by will without more than two subscribing witnesses (1). Nor can any distinction be taken between that case and the present, upon the ground that there the question related to the introduction of a statute, and that here the introduction of the common law is in dispute; for in *Freeman v. Fairlie*, and in almost every question that can be raised, touching the application of the forms of conveyance known in our law, the argument is confined entirely to assurances, which are the creatures of statute. No instance has ever been produced of land passing in Calcutta, by the common law conveyance of feoffment and livery. The introduction of the English law is proved by shewing, that the mode of conveyance is adopted by lease and release, that is, upon the Statute of Uses.

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Reference has been made, both here and in the Court below, to the opinion of Sir F. NORRON, in 1764; and the true account of that opinion was given here, though it does not seem to have

(1) This apparently refers to *Gardiner v. Fell*, 20 R. R. 208 (1 Jac. & W. 22).—F. P.

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been accurately understood below. It holds very distinctly, that the subjects of a conquered or a ceded territory, are only to be considered as not being aliens, by virtue of the treaty which gives them the rights of subjects, and that none but such as can claim the benefit of the treaty can hold or transmit lands. We say this is the purport of the opinion, and that it was so represented here; for indeed the argument maintained by the Crown requires the proposition to be carried thus far, that upon a conquest or a cession, all the inhabitants continue aliens after the change of dominion, unless *and until the conqueror or purchaser grants their naturalization. But this position seems wholly untenable; for all the authorities lay it down, that upon a conquest, the inhabitants, *ante nati*, as well as *post nati*, of the conquered country, become denizens of the conquered country; and to maintain that the conquered people become aliens to their new sovereign, upon his accession to the dominion over them, appears extremely absurd,—almost as inconsistent with common sense as it would have been to hold the English inhabitants aliens under James I., at a time when there was even a question raised whether the *ante nati* of Scotland did not become, by his accession, denizens in England. The Court below, it must be observed, distinctly admit, that conquest operates what they term a virtual naturalization. But Sir F. NORTON holds that, without express provision in a treaty, the subjects conquered are aliens. Even if all the rest of the argument be admitted, still it cannot be denied that the Crown may relinquish its prerogative. Indeed, whenever the inhabitants of conquered provinces are held to obtain the rights of subjects by treaty (and even Sir F. NORTON has no doubt of this being possible), those who hold the doctrine the most rigorously, must say that the treaty is a voluntary abandonment of a right to the Crown. It evidences the will of the sovereign to exempt the conquered territory from this branch of his prerogative. But the same will of the sovereign may be collected from other circumstances, and the like abandonment of the prerogative be thus evidenced. The charters, regulation, and the Act of Parliament to which reference has so often been made, appear sufficient circumstances from which to collect *this will of the sovereign, and so prove the abandonment in the

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present case; and this even upon the supposition, that in consequence of the prerogative being generally admitted, the proof lies on those who would set up an exemption—on those who would shew that the English law of forfeiture was not introduced into Calcutta—rather than on those who undertake the affirmative proposition.

Upon the whole, their Lordships are of opinion, that the law incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into Calcutta. There appears still less reason to hold that it has ever obtained a footing in the Mofussil; but into the additional grounds for differing with the Court below upon that part of the case, it is unnecessary to enter, as we consider that the decree must be reversed upon the part relating to the Calcutta property, and, therefore, can have no doubt as to pursuing the same course with the part relating to the Mofussil property. Upon this branch of the cause, therefore, it will be necessary to reverse that part of the decree which declares, that the testator having been an alien, at his decease, his lands and houses in Calcutta would not pass by his will, and that there was not evidence sufficient to determine whether or not the testator's lands and hereditaments in the Mofussil could pass by his will, together with the consequential directions; and then to declare, that all the real property of which the testator died seised within the Presidency of Fort William, whether in Calcutta or not, except in Chandernagore, passed by his will, and formed part of the residue; and an inquiry must be directed as to the nature and tenure of the property at Chandernagore, *and the usages and laws prevailing there, touching the right of an European-alien to devise the same, confining the inquiry directed by the decree to such property, and to ascertaining what part of the funds now standing to the account of the cause, has arisen from the rents and profits of the property at Chandernagore, and the interest of those rents and profits.

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II. The next point is raised by the course pursued below, upon the Master's report of 19th July, 1830,—the re-hearing of 25th July, 1831, and the Master's report, 1831; and this becomes very material, as involving the question, whether or not the

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Court was concluded as to the bequest for Constantia college, or the Lucknow charity, by what the Master had in the first instance found, and by his finding being confirmed.

The decree 2nd December, 1822, directed an inquiry, whether the college could be established, and whether the bequest of 4,000 rupees for liberation of prisoners at Lucknow, could be carried into effect with reference to the testator's intention, and the sanction and dispensation of the Lucknow Government. The Master, 3rd February, 1830, made his report in the negative as to the 4,000 rupees, following the words of the decree; and as to the college, he reported that there was not sufficient evidence before him, to enable him to report, but as no further evidence was likely to be obtained, he annexed that which had reached him, the most material part of which, was a statement of the Resident, that the King of Oude would not object to the establishment, but would hold out no expectation of his countenancing or supporting it.

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To this an exception was taken, on the ground, that the Master had not reported as directed; and the exception being allowed, it was referred back to the *Master, who reported, on the 9th July, 1830, that neither the establishment of the college, nor the bequest of 4,000 rupees, could, with reference to the testator's intentions, and the sanction and disposition of the Lucknow Government, be carried into effect. This second report was confirmed by an order made the 17th February, 1831, which stands still unaltered. Notwithstanding this, the Court, on the rehearing, referred it to the Master to inquire and report, whether or not the Governor-General in Council had the means of giving effect to the bequests above-mentioned, and whether the Governor-General would receive, or authorize some one to receive, the fund for these purposes. The Master, on the 5th November, 1831, reported, that the Governor-General was willing to do so, and annexed to his report the letter of the Government Secretary, stating that the Government had no objection to apply the money through the Government Agent at Lucknow. But the Master did not answer the most material question put to him; he did not report whether or not the Governor-General had the means of giving effect to the bequests. The Court, however, on the

20th March, 1881, confirmed the report, and decreed that, as it was unable to give effect to the bequest itself, and as the Governor-General had the means, and was able to give effect to the bequest, and was willing to receive the fund, it should be paid over to him, or such person as he should appoint.

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The irregularity of the whole proceeding is manifest. The Master's report stands confirmed, that the bequests could not at Lucknow be carried into effect, and the subsequent reference for inquiry, the report and confirmation, with the decree proceeding upon it, could not be made while that order stood. In the *Courts of this country, there could be no doubt at all upon this head; even this would have been set aside as of course. And although, sitting in this place, their Lordships are in the practice of refusing to let mere matter of form shut them out from the substantial merits; yet the irregularity, and indeed the total inaptness of the proceeding, is such, as could not have been disregarded, had it not been for one consideration of material importance. There was no party in the Court below, interested in objecting to this proceeding; or rather, indeed, all parties might be said to have an interest in letting the irregularity pass, and the first report, with the order confirming it, stand. Their Lordships do not, therefore, think that they should satisfy the justice of the case, were they to suffer the objection now to be taken with effect, and this material portion of the decree to be thus frustrated. But it was fit to mark their opinion of the irregularity, which, in any other circumstances, must have proved fatal. There is another material consideration, besides the one already stated, in favour of getting over the irregularity in the present instance. The first inquiry and report set forth, that the bequest could not be carried into effect, with reference to the sanction and disposition of the Government of Oude. Now the evidence only states that the King of Oude has no objection to the establishment, though he will not promise to encourage it by his countenance and support. The report then seems to go beyond the evidence as regards the college, though it seems quite correct as regards the 4,000 rupees. The inquiries afterwards directed, apply to the proposed interference of the Governor-General, to aid the establishment of the college with

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the Lucknow Government; and it may be contended, *that if the first report had been more in accordance with the evidence, there would not have been any material discrepancy between its finding, and the subsequent inquiry; for the subsequent inquiry might be only to ascertain whether the means existed, with help of the Governor-General. Then supposing the irregularity got over, we come to the next question.

III. Can the decree as to the application of the fund stand?—shall the fund be applied to the establishment and support of a college at Lucknow?—shall it sink into the residue, and be divided between the two charities appointed to be established at Calcutta and at Lyons?—for the cases of *Attorney-General v. Bishop of Llandaff*, and *Attorney-General v. Ironmongers' Company* (1), make it clear that in this case, which is indeed stronger than either of those, the other two charities must take if the gift fails as regards the third. If the fund is to be applied in Lucknow, shall it be applied as the decree directed, or in what other way?—But it must here be observed, that the decree assumes the Master to have reported, or the evidence before the Court to have proved, that the Governor-General has the means of giving effect to the bequest at Lucknow; but this no where appears in any way. The report of the 5th November, 1831, states, that the inquiry directed had been made, viz. whether the Governor-General had the means of giving effect to the bequest, and was willing to receive the fund, and apply it, but only adds, that the Governor-General was willing, without stating whether or not he had the means. The correspondence annexed to the report contains a question, put to the Governor by the Company's acting attorney, whether or not the Court, by declaring its own inability to give effect to the bequest, (but stating that the Governor-General *had the means of so doing, and was willing to receive and apply the fund) would be proceeding upon a right construction of the Governor-General's former answer, that the services of the British officer at Lucknow would always be available for the purpose required? The answer of the Governor-General avoids the question as to his

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(1) 9 R. R. 302 (2 Myl. & K. 576, 586).

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having the means, and only states, that if the Court chooses to leave the entire matter to the Government, he sees no objection to transfer the duty to the agent at Lucknow, and will receive and apply the fund. In returning this answer, the Government Secretary refers in terms, to the words of the proposed decree, as stated in the question put by the Company's acting attorney; and as he is silent upon the material portion of those words, referring to the Governor-General having "the means," there seems no room to doubt that the question is purposely avoided. We do not, therefore, think it possible that this part of the decree can stand, because the foundation is removed on which it is rested. The Court must have an answer to the inquiry, and a reasonable ground for assuming that the bequest can be carried into effect, before it can part with the fund. But the manner in which it is proposed to part with the fund is also, in our opinion, improper. The Court gives the control of it, not to any party, or any competent authority pointed out by the testator, as was done in the case of *The Provosts and Bailiffs of Edinburgh v. Aubrey*, in *Oliphant v. Hendrie* (1), and the other cases of this class. Nor does it give the control and management to any person under its own superintendence, and amenable to its jurisdiction; giving it to the Government is letting go all hold over it, and at once departing with its jurisdiction to those who can never in any way be interfered with or called to account. It appears clear, that if the Court had been satisfied of the means existing for effecting the testator's purpose at Lucknow, there should have been appointed a trustee or trustees for applying the fund, under the superintendence of the Court, and that these trustees should, therefore, have been persons residing within its jurisdiction; and if officers of its own, so much the better.

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This part of the decree must therefore be altered, by reversing the part which declares that the Governor-General had the means, and was able to give effect to the bequest for the college at Lucknow, and such part of the consequential directions as relates to paying over the fund to the Governor-General, or person appointed by him. But the part of the decree declaring

(1) 1 Br. C. C. 571.

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the bequest of 4,000 rupees void, is to stand; and also the part relating to sums which may be due to persons on account of any expenditure already made at Lucknow. Then, for the part reversed, there must be substituted, a direction that further inquiry be made as to the power of the Governor-General to aid trustees to be appointed by the Court in giving effect to the bequest regarding the college; and if the Court shall be satisfied that in this, or in any other way, such trustees can give it effect, then the fund is to be paid over to such trustees, who are to report from time to time, to the Master, and to administer the fund under the superintendence of the Court. The Court giving such directions as may be necessary to establish the charity according to the will. Their Lordships are well aware that in pursuing this course, they are sanctioning a proceeding, for which there is *no exact and complete precedent in the administration of charitable funds in this country. But in one respect there is *sufficient authority, viz., as far as regards a postponement of distributions, and the not declaring the gift void, on account of any present difficulty in giving it effect. The case of *Attorney-General v. Bishop of Chester*, furnishes a direct authority for not declaring a legacy void because it was for an object which could not at the time be accomplished, and for retaining the fund in Court until it should be possible to apply it. No doubt if, in that case, some years had elapsed, and no prospect appeared of an Episcopal establishment in Canada, the Court would then have declared the legacy void, and distributed the fund to the parties entitled. So here, if it shall be found, either at first that there can be no application of the fund in the manner directed by the will, or that the trustees, after making the attempt, fail in it, the Court will then direct the same application to be made of it, which they would have done had the bequest been at first declared void.

Where there exists a party entitled to receive a fund bequeathed for a foreign charity, there can be no objection made to give over that fund to him, and allowing him to administer it in the country in which the charity is to be established; this has been repeatedly done, both where the party was within the jurisdiction of the Court, and where he was beyond it, as

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Mornet v. Vulliamy (Switzerland), and *Marion v. Paxton* (Lyons), and *Emery v. Hill* (1), which followed the former precedents.

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The Court has gone further, of late years, than Lord HARDWICKE thought he could in *Provost of Edinburgh v. Aubrey*; for he then held, that he could give no directions as to the distribution. But in *Cadel v. Grant*, 1795, *Oliphant v. Hendrie*, and in *Attorney-General v. Lepine* (2), the Court interfered with the application of the fund, directing a scheme to carry the charity into execution. In the latter case, the objection was taken to the jurisdiction, on the ground that the charity was to be executed in Scotland; but it was abandoned, and the decree affirmed, on the re-hearing. In a subsequent stage of the same cause, the objection appears to have been renewed with effect; for there is a report of a re-hearing of the former decree, when Lord ELDON reversed so much of it as directed the scheme approved by the Master to be carried into execution. There is another case, *The Attorney-General v. The Mayor of London* (3), as to a charity in America, in which no difficulty was held to exist in directing a scheme as long as the American settlements remained under the Crown; but there it was contended, that the moment they became severed, by the cession at the end of the American war, the objection for the first time arose. The Court appears there, nevertheless, to have directed a scheme; though it was said, and justly said, that exactly the same objection, as to the jurisdiction, existed to the scheme being directed before the severance as since; for the Court of Chancery had no jurisdiction, before the severance, to grant a scheme except to a party within its jurisdiction, the Court operating through those parties; the severance made no difference in that respect. The difficulty in the present case arises from there being no party entitled to receive and administer the fund abroad, to whom the Supreme Court in Bengal *could hand it over, and no person within its jurisdiction who could administer the fund under its superintendence. But as in this country the Court has directed a scheme where there was a party, so it has also supplied the want of a trustee. In

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(1) 25 R. R. 11 (1 Russ. 112).

(3) 2 Swanst. 180; 3 Br. C. C.

(2) 19 R. R. 55 (2 Swanst. 181).

171; 1 Ves. Jr. 243.

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Attorney-General v. Stephens, the charity was to be executed in Lisbon, and two trustees had been named by the testator, one of whom was an official person under an Act of Parliament, which being repealed, the co-trustee only remained. This was the Consul-General, and he refused to continue in the trust without another to aid him. The Master of the Rolls appointed a new trustee on the Consul's application. Possibly this decision, taken with the former one, may afford a precedent sufficiently near the present to warrant the course taken. But its complete justification must be sought in the peculiar circumstances of the case; and where there exists any possibility of pursuing the declared intention of the testator upon the subject, on which, of all others, he plainly was the most anxious, their Lordships would be very unwilling to frustrate that intention by directing the funds to other objects. This seems to have been the strong inclination of the Court below, and we only differ with them as to the means of giving effect to it.

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This, however, is not the peculiarity to which we principally refer. The objection, in the ordinary case, to administering a foreign charity under the superintendence of the Court, is this: those who are engaged in the actual execution of it, are beyond the Court's control, and those who are within the jurisdiction are answerable to the Court for the acts of persons as to whom they can derive no aid from the Court. Such an office will not easily be undertaken by any one; *and its duties cannot be satisfactorily performed; at least the party must rely more on the local, that is, the foreign authorities for help, than on the Court to which he is accountable. But in the present case, there is reason to hope for the interference of the Government. The Court cannot shut its eyes to the weight which that Government has with the Court of Lucknow. It can hardly be said that the authorities there are wholly on the footing of a foreign and unconnected, though possibly they may be an independent, State; and there seems sufficient ground for expecting that the Supreme Court may find fit persons, possibly official persons, willing to undertake the office of administering the charity under its superintendence. The jurisdiction of the Court, moreover, extends over all British subjects residing

within the limits of the charter, whether in the British or in native dominions, and this affords facilities for the execution of the charity under the Court's superintendence, which could not exist in any of the cases cited.

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IV. The question on the Mortmain Act cannot be said any longer to exist in the cause. It is agreed on all hands, that the statute does not apply to India. With respect to the application of the fund, should the execution of the bequest be found impossible, their Lordships decline giving any directions, because it might produce an impression that they doubt the possibility. Whereas, upon all the facts in the case, and all that is known of the state of affairs in the East Indies, they entertain no doubt whatever respecting it.

V. The Court below properly ordered the costs of all parties to be taxed, as between solicitor and client, and paid out of the general fund standing to the credit of the four causes. The costs and charges of the present *appeal must be taxed in like manner as between solicitor and client, and paid out of the fund standing to the general credit of the cause, the sum advanced being liable to apportionment among the funds; when the cause goes back to the Supreme Court.

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ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY (1).
ANNA MARIA WELCH AND LUCY ALLEN WELCH
v, NATHANIEL PHILLIPS (2).

(1 Moore, P. C. 299—308.)

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The rule of law is, that if a will be traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself, and that presumption must prevail, unless there is sufficient evidence to repel it, and to raise a higher degree of probability to the contrary. The onus of proof in such cases lies upon the party propounding the will.

THIS was an appeal from a decree of the Prerogative Court, admitting to probate the copy of a will, dated the 29th May,

(1) Present: Lord Brougham, Mr. Baron Parke, Mr. Justice Bosanquet, and the Chief Judge of the Court of Bankruptcy.

(2) *Sugden v. Lord St. Leonards* (1876) 1 P. Div. 154, 45 L. J. P. 49; *Homerton v. Hewett* (1872) 25 L. T. (N. S.) 854.

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1825, as the last will of Mrs. Hannah Leader Arnold, the mother of Emma Docia Phillips, the wife of the respondent; the deceased having made and published a previous will on the 8th of November, 1820, which was found at her decease uncanceled, and, as it was insisted, unrevoked, by the subsequent instrument of the 29th May, 1825.

The facts and circumstances of the case, as proved in evidence, and upon which the question of intention turned, are fully stated in the judgment. Respecting the principles of law, which allow a previous uncanceled will to be set up by the destruction or revocation of a subsequent one,—

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Dr. Addams and Mr. Whately, for the appellants :

Cited 4 Burn's Ecc. Law, 198 (b) ; *Ex parte Hellier*, 3 Atk. 798 ; *Glazier v. Glazier*, 4 Barn. 2512, Lofft, 575 ; *Wilson v. Wilson*, 3 Phil. 548 ; *Usticke v. Bawden*, 2 Addams, 116 ; *Kirkcudbright v. Kirkcudbright*, 1 Hag. 325 ; *Colvin v. Fraser*, 2 Hag. 266 ; *Lillie v. Lillie*, 3 Hag. 184.

Dr. Phillimore and Dr. Lushington, for the respondent :

Cited *Rickards v. Mumford*, 2 Phil. 28 ; *Gibbens v. Cross*, 2 Addams, 455 ; *Helyar v. Helyar*, 1 Lee, 472 ; *Whitehead v. Jennings*, ib. 510 ; *Burt v. Burt*, ib. 511 ; *Moore v. De la Tone*, 1 Phil. 375, 406 ; *Horton and Dickens v. Head*, 3 Phil. 26, 32 ; *Johnston v. Johnston*, 1 Phil. 447.

PARKE, B. :

There are two questions, both of fact, for the decision of their Lordships on this appeal. First, whether the deceased cancelled or destroyed a second will, *animo revocandi* ; and secondly, whether, if she did so, she intended to revive a prior will, or to die intestate. The learned Judge of the Prerogative Court, though with much doubt and hesitation, gave his opinion that the second will was not revoked, and therefore decreed probate of an authentic copy of it. Upon a careful consideration of the evidence which has been laid before us, and been commented upon with great acuteness and ability on both sides, we feel ourselves obliged to come to the conclusion, that the second

will was revoked, and that the deceased did mean the former will to take effect.

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These facts were admitted on both sides: that the *deceased made a will on the 8th November, 1820, by which she left to her daughter and only child, who had then been married about a year and three quarters to a Mr. Phillips, all her personal property, consisting of about 1,400*l.* in the funds, and some furniture, plate, and effects, of the value of about 250*l.*, for her separate use for life; and if she died leaving no children, then the pecuniary part of her property was to go to Mrs. Welch, the wife of her nephew, one of the appellants, for her separate use, and contingently to the other appellants; the other part, not pecuniary, to be at Mrs. Phillips's absolute disposal. This will was left by her, sealed, in the custody of Mr. Welch, uncanceled, at the time of her death, 25th January, 1833. On 29th May, 1825, the deceased made another will, and by it she bequeathed, in substance, all her personal property to Mrs. Phillips, to her separate use. She had prepared this will herself, and she kept it in her own custody. It remained there in 1826, when it was copied by a Mrs. Wadman, at her request, for the purpose of her taking the opinion of her husband, a barrister, on its validity. From that time the original was never again seen; but immediately after her death, the original will was discovered on the search that took place in her repositories. Another circumstance may be added as undisputed, and proved by a witness for the respondent, and not questioned on either side, that the deceased, on her death-bed, when she knew she was dying, solemnly declared "she had made her will;" an expression which may suit either of the two wills, but which is utterly inconsistent with her having none.

Upon these facts it is perfectly clear, that the deceased did not mean to die intestate, and that she had *a will. The only question, therefore, which remains is, which of the two wills executed by her was her last will? If that of 1825 had been cancelled by her, *animo revocandi*, that of 1820 was undoubtedly her last will; if not, the will of 1825 was her last will, and the probate given was properly decreed. The point, therefore, to be determined, is, whether the will of 1825 had been cancelled.

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Now the rule of the law of evidence on this subject, as established by a course of decisions in the Ecclesiastical Court, is this: that if a will, traced to the possession of the deceased, and last seen there, is not forthcoming on his death, it is presumed to have been destroyed by himself; and that presumption must have effect, unless there is sufficient evidence to repel it. It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, and would not be either lost or stolen; and if, on the death of the maker, it is not found in his usual repositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it. But this presumption, like all others of fact, may be rebutted by others which raise a higher degree of probability to the contrary.

The onus of proof of such circumstances, is undoubtedly on the party propounding the will (1).

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The question then is: Have then the respondents in this case satisfied the exigencies of the law, by giving such evidence as ought to raise in our minds a stronger presumption that the will of 1825 was not *purposely destroyed? We are all of opinion, on a careful review of the facts, that he has not; and that there are, on the other hand, strong averments which confirm the presumption that the will of 1825 was cancelled.

To raise a contrary inference, the respondent places much reliance on the proof of the deceased's declaration, that Mr. and Mrs. Phillips would inherit her property, on her expressions of affection and regard to them, and of acts of confidence in Mr. Phillips, and on evidence of contrary feeling towards Mr. and Mrs. Welch. In our judgment, however, all these circumstances are of little or no importance on this issue. The declaration that the respondent and his wife would succeed to her property, are perfectly reconcilable with the will of 1820, by which Mrs. Phillips takes a life interest in the whole, and in the furniture and plate the power of disposition, in case she should die without children living at her death; and such of

(1) *Colvin v. Frazer*; *Lillie v. Lillie*.

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the declarations (and these are, I believe, the greater part) which related to her effects, not of a pecuniary nature, agree just as well with the will of 1820, after destruction of the codicil, as that of 1825, for there was not much likelihood of Mrs. Phillips having a family, and the difference between the disposals in the two wills was therefore trifling. With neither will do they exactly accord, because under neither does Mr. Phillips take anything. As to the expressions of affection and regard to the respondent and his wife, they are in no way inconsistent with the will of 1820, by which the daughter is provided for, for life, and her children after her; and Mr. Phillips, it is to be recollected, would take his wife's share of all the settled property. The confidence in the respondent, evinced by giving him *a power of attorney to receive the small dividends due to the deceased, would be of little moment, if it had occurred immediately after the will of 1825, and been continued to her death; but it appears, from the second article of the respondent's allegation, that this power was given to him about 1823, and, consequently, long before the will of 1825 was made. It is, therefore, of no weight whatever in the case. And with respect to the declarations of antipathy to Mr. Welch, admitting them to be proved, they raise no presumption against the will of the testatrix, which does not benefit him at all, but leaves the interest in the residue to Mrs. Welch's separate use; and there is no satisfactory proof of any antipathy against her; for such is not to be inferred from some expressions towards her, which might occasionally drop from a person of advanced age, and of irritable temper, as Mrs. Arnold was.

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All these circumstances are, in our judgment, of very little importance in deciding this question. The only material evidence which the respondent brings forward, is that of Mr. Bowering. This gentleman was one of the witnesses to the will of 1825. He deposes, that on several occasions after the execution of that will, the deceased alluded to it, reminds him that he had witnessed it, and that she would give everything to her daughter. He says, he is certain she had done so in the last year of her life, but he cannot state it more particularly; "he cannot at all give the dates." Now it is by no means

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perfectly clear, that in this conversation the deceased alluded to the will as then subsisting; she was an old lady, fond of concealment, as the witness says, and might refer to this as a bygone transaction. But admitting that she meant to acknowledge *the will of 1825, as then being in existence, this evidence only proves that the will was not then destroyed, and narrows the period within which the presumption of its destruction is to take place to some part of the last year of her life. But how does this rebut the presumption altogether? Does not the probability still exist that the will was subsequently destroyed?

On the other hand, there are some circumstances which strengthen the supposition, that the will was not lost or abstracted. The deceased was a careful person. She told Mrs. Nicholson she should take care of the will, and put it in her little red trunk, where she kept her money and papers of consequence. We may infer that it was not found in that repository, and if the box itself had been missing that fact would have been proved. The testatrix was surrounded by persons not likely to abstract such a will. But the most material fact, and which, if true, in our judgment is decisive of this case, is, the order in September, 1832, for the destruction of the codicil left in the care of Mr. Welch, whilst the will itself, deposited in the same hands, was left untouched.

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A doubt is thrown on the veracity of Mrs. Winter, the witness who proves this transaction, on the ground of the contradiction between her evidence and that of Mr. Welch, the other witness to the codicil and its contents. We do not think, however, on contrasting their testimony, that such contradiction necessarily exists. Mrs. Winter swears that the deceased told her the contents of the codicil were, to give her plate and furniture, at Mrs. Phillips's death, to Mrs. Welch. She says she was on intimate terms with the deceased, who might therefore choose to confide the contents of the *codicil to her. Mr. Winter states that she read, what he supposes to be all the codicil, to him, and she said it was to leave the plate and furniture to Mrs. Phillips, and did not mention the Welch's. She did not shew even the codicil itself. What improbability is there in supposing that she did not wish him to know all

the provisions of her codicil? That she was more reserved towards him than Mrs. Winter is clear, for she does not disclose to him the name of the person who was to keep it; she said it was a friend; but to Mrs. Winter she communicates the fact of delivering the codicil to Mr. Welch, her nephew. It is, besides, most likely that the contents were as Mrs. Winter deposes, for as the will had clearly left to Mrs. Phillips the plate and furniture, with a like power of disposing of them if she had no children, and there was, most likely, no great chance of her having any in 1821, the probability is, that Mrs. Arnold would not make a codicil merely to give Mrs. Phillips the same power which she had substantially by the will; but it is very likely that if she made a codicil it would alter the will in some material point, and the contents, as deposed to by Mrs. Winter, would have that effect. We are disposed, therefore, to rely fully on her testimony; whatever doubt may be entertained, from her acknowledged want of memory, as to her accuracy in reporting conversations, always so apt to be forgotten, mistaken, or misapprehended. There cannot be any reasonable doubt, as to her statements of facts being substantially correct; and these facts are, that some sort of codicil to the will of 1820 was made, on or about the year 1821; that the codicil was placed by her directions in the hands of Mr. Welch, who then had the will; that she gave an order in 1832 to destroy *the codicil, but not the will. Without relying on what the deceased said at the time, and whatever the contents of the codicil were, the circumstance is most important to shew, that the deceased considered that will as then operating, which it could not be unless the will of 1825 had been then cancelled. The deceased knew that the first will and codicil would be in force, unless she executed the second, for Mrs. Nicholson's evidence shews that she made her second will avowedly for the purpose of revoking her first. The fact, therefore, of recognising the codicil is a proof, that she must have then annulled the second will; and, at the same time, the order to cancel that codicil, and not the will, is an implied direction still to keep the first will, and amounts to a recognition of its validity, and cannot, as we think, be satisfactorily explained in any other way.

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But if to this circumstance we add the remarkable declaration sworn to by Mrs. Winter, as to which she could hardly be mistaken, when the deceased, the last time that she saw her, and when she gave directions to have the codicil destroyed, put her hand on Mrs. Winter, and said, "Tell Maria (Mrs. Welch) I have not made another will, nor ever will;" which is referable only to that will which Mr. Welch had in his custody. We feel fully satisfied, that the will of 1825 must then have ceased to operate; and there is no question but that if that will had been destroyed, the will of 1820 was in full force.

Upon the whole evidence, therefore, we think that the respondent has not rebutted the presumption that the will of 1825 had been cancelled by the deceased herself; but, on the contrary, that the weight of evidence is in favour of that supposition.

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Their Lordships, therefore, will advise his Majesty to reverse the decree of the Prerogative Court, and to direct probate of the will of 1820, to be granted to the personal representatives of the residuary legatee.

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY (1).

THOMAS MOULDEN SHERWOOD v. ROBERT RAY (2).

(1 Moore, P. C. 353—403.)

1837.
Feb. 1, 2, 7, 8.
Nov. 28.
Dec. 16.

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The Act 5 & 6 Will. IV. c. 54, provides that all marriages which shall have been celebrated before the passing of the Act, between persons being within the prohibited degrees of affinity, shall not thereafter be annulled for that cause by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be depending at the time of the passing of the Act: Held, that the issuing of the citation in a cause of nullity of marriage seven days previous to the Act receiving the Royal assent was within the meaning of the Act, so as to constitute a suit "depending."

The *patria potestas* of the civil law as respects the marriage of children was abolished by the canon law, which is the law by which marriages are

(1) Present: Lord Brougham, Mr. Baron Parke, the Chief Judge of the Court of Bankruptcy, and Sir John Nicholl.

(2) Referred to by Sir R. PHILLIMORE as a case "of great importance,"

Elphinstone v. Purchas (1870) L. R. 3 P. C. 245, 254, 39 L. J. Ecc. 124; discussed and approved in judgments, *R. v. Bishop of Oxford* (1879) 4 Q. B. Div. 525, 571, 585, 591, 48 L. J. Q. B. 609.

governed in this country, except so far as it has been restricted by the Marriage Acts.

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Any interest, however slight, provided it be specific and pecuniary, whether to be secured in a contingent right, or released from a possible legal obligation, is sufficient to entitle a party to sustain a suit in the Ecclesiastical Court for nullity of marriage, on the ground of affinity.

Where, therefore, a father brought a suit to dissolve a marriage contracted by his daughter, after she was of age, by reason of incest: Held, that his possible liability, under the 43rd of Eliz. c. 2, to maintain the issue of the marriage, if legitimate, in case of the death or impotency of the parents, was an interest sufficient to entitle him to sustain the suit; and a sentence of nullity of marriage was pronounced therein.

THIS was an appeal in a cause of nullity of marriage, by reason of affinity, promoted by the respondent against the appellant and Emma Sarah Ray, his daughter, under the following circumstances :

Mr. Ray, by his marriage, amongst other children had two daughters, Anna Rachael Louisa, and Emma Sarah Ray.

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On the 17th July, 1827, Mr. Sherwood, the appellant, was married to Anna Rachael Louisa, who died on the 3rd of April, 1834, leaving her husband and two children, the issue of the marriage, surviving. On the 29th of June, 1835, the appellant was married to Emma Sarah Ray, the sister of his former wife. The marriage was secret and clandestine, Miss Ray having gone from her father's house at Edmonton to the church of St. Mary, Whitechapel, where the ceremony was performed, and immediately after returned to her father's, where she continued to reside, and had never lived or cohabited with Mr. Sherwood as his wife.

The marriage was not discovered until Saturday the 22nd of August following; and on Monday the 24th of that month a citation, returnable the third day after service, issued from the Consistory Court of London, at the suit of the respondent, "as the natural and lawful father of Emma Sarah Ray, falsely calling herself Emma Sarah Sherwood, and, as such, a person interested in the legitimacy or illegitimacy of her issue," calling on the appellant, Mr. Sherwood, and Emma Sarah Ray, to answer in a cause of nullity of marriage, by reason of incest.

The citation was served personally on both parties on the day it issued.

On the 31st of August, 1835, the Act 5 & 6 Will. IV. c. 54, intituled, "An Act to render certain Marriages valid, and to

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alter the Law with respect to certain voidable Marriages," received the Royal assent. After reciting, that "Whereas marriages between *persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto, and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable," it enacts, "That all marriages which shall have been celebrated before the passing of the Act, between persons being within the prohibited degrees of affinity, shall not thereafter be annulled for that cause, by any sentence of the Ecclesiastical Court, unless pronounced in a suit which shall be *depending* at the time of the passing of the Act: provided that nothing hereinbefore enacted shall affect marriages between persons being within the prohibited degrees of consanguinity:" and it also enacts, sec. 2, "That all marriages which shall thereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void, to all intents and purposes whatsoever" (1).

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On the 9th of September following (being the first court day after service of the citation), an appearance *was given both for Mr. Ray and his daughter; and on the same day a libel was brought in on behalf of *Mr. Ray, setting forth the circumstances of the marriage, and alleging its illegality, as contrary to the *99th canon of 1603, being within the degrees prohibited by the laws of God, expressed in a table set forth by authority in the year 1563.

On the 14th of October Mr. Sherwood's proxy appeared for him; the appearance was absolute, and not under protest.

On the 14th of November, additional articles were exhibited on the part of Mr. Ray, alleging, among other things, "that Emma Sarah Ray had become entitled to, and was possessed of, considerable sums of money or shares of Three per cent. Stock, bequeathed to her by Henry Barker, her maternal great uncle,

(1) See note at end of case.

*and to which, with other personal estate of the said Emma Sarah Ray, he the said Robert Ray, her natural and lawful father, would be entitled in case of her death, a single woman, without lawful issue and intestate.”

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The admission, both of the libel and additional articles, was opposed, and on the 18th of January, 1836, the Judge of the Consistory Court (Dr. LUSHINGTON) rejected the libel and additional articles.

From this decree Mr. Ray appealed to the Arches Court of Canterbury; and on the 5th of July, 1836, the appeal came on for hearing before that Court, when the learned Judge (Sir HERBERT JENNER) having taken time to consider, pronounced for the appeal, and admitted the libel and additional articles (1).

Mr. Sherwood appealed from this decision to his Majesty in Council.

Dr. Addams and Mr. C. Austin, for the appellant.

The King's Advocate (Sir John Dodson) and Mr. Serjeant Wilde, K. S., with whom was Sir William Follett, K. C., and Mr. M. D. Hill, K. C., for the respondent.

Dr. Addams :

This is a cause in which the marriage is not void, but only voidable; until therefore it is declared void, Mrs. Sherwood is entitled to the status of her husband; if he die pending these proceedings she alone will be entitled to administration; or if she die, she will die his wife, and the children, if there are any of the marriage, will be legitimate: *Elliot v. Gurr* (2).

There are two questions for the determination of the Court :

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First, whether the marriage is within the recent statute of 5 & 6 Will. IV. c. 54.

Second, whether Mr. Ray, the father of this lady, has such an interest in the marriage as entitles him to question its validity in the Ecclesiastical Court.

With regard to the first point, we must look to the words of the Act of Parliament. The marriage was celebrated some time

(1) See both judgments reported,
1 Curt. 173 & 193.

(2) 2 Phil. Rep. 16, 18. See also
Hinks v. Harris, Cath. 271.

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before the passing of the Act, and therefore, if not within the exception in the Act, is valid to all intents and purposes, and cannot be dissolved by any sentence of the Ecclesiastical Court, whereas, if it is not within the exception of the Act, it is absolutely void. This is the dilemma in which the party seeking to dissolve this marriage is ; and in order to extricate himself from it, Mr. Ray insists, that the citation having issued on the 24th of August, seven days before the Act of Parliament received the Royal assent, he is within the provision for the saving of suits then existing, and that in the words of the statute this was a suit "depending at the time of the passing of the Act."

Now this involves the main question in the case, viz. in what sense the Legislature has used the word "depending." It is clear, both from the title as well as the provisions of the Act, that the object of the Legislature was to validate marriages heretofore questionable, as well as to prevent such marriages in future.

The exception is of suits "depending," that is not merely commenced, but so commenced as to be actually depending ; the term has been used advisedly, and cannot be rejected as surplusage. In all statutes where there is a limitation to actions, the word "commenced," *or "brought," is used : thus in 31 Eliz. c. 5, sec. 3, 5, 6, the words are, "had, sued, commenced, or brought;" and in the 27 Geo. III. c. 44, for the limitation of suits in the Ecclesiastical Court, it is enacted that no suit shall be "commenced," for the offences therein enumerated after the expiration of eight calendar months. This is a plenary cause, and must be governed by the rules of the Ecclesiastical Courts, or, in other words, by the canon law. To constitute a suit depending in these Courts, there must be *litis contestatio*, it is not sufficient that there be *litis pendentia* ; and to constitute the *litis contestatio* the parties must have joined issue, that is the doctrine of Lord STOWELL in *Bowzer v. Ricketts* (1).

The same rule is laid down by Maranta : "*Judicium, lis, instantia et causa, qualiter accipiantur. Et quid unumquodque illorum*" (2).

It is not, therefore, enough that the cause should have begun, but it must have begun to depend, that is the true intent of the

(1) 1 Hagg. Cons. Rep. 214.

(2) Par. V. p. 180, pl. 64.

statute, and is conformable to the practice in the Ecclesiastical Courts (1). SHERWOOD
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The Act 27 Geo. III. c. 44, limits the period for bringing suits in the Ecclesiastical Court, for defamation to six months, from the time when such defamatory words shall have been uttered; and for fornication, incontinence, or striking or brawling in a church, to eight months from the time when such offence shall have been committed. The word there used is "commenced." There has been no decision upon that statute; but it is plain that the Legislature have here intended a marked distinction, by using the word "depending" instead of "commenced."

By the civil and canon law, criminal suits must be commenced within two, and civil suits within three years (2). [363]

That is not an obsolete doctrine, as is proved by the case of *Bowzer v. Ricketts*.

The Clementine Constitution, B. ii. tit. 6, ch. 2, recognises the distinction between a citation calling upon a party to appear, and one setting forth the right of action, and treats the former as a criminal proceeding.

The citation here does not shew the cause of action; it is only for an appearance. Now a party may be cited to appear in a cause which, when litigated, shall have a totally different object from that originally contemplated: as in a suit for the restitution of conjugal rights, if the wife plead cruelty and adultery, the suit becomes one for divorce: in such a case how can the cause be said to be depending before there has been *contestatio litis*?

No analogy can be drawn from the decisions at common law. The case of *Smith v. Johnson* (3) decided, for the first time, that the suing out a *latitat* was the commencement of a suit within the meaning of the Statute of Limitations (4); but that decision turned entirely on the wording of the statute, which enacts, that all actions shall be commenced and sued, &c. within six years; had the Act used the word "depending," the decision would have been different.

The statute of 4 Ann. c. 16, s. 22 (5), providing against the

(1) Outram, 1 vol. p. 21; Conset. Ecc. Prac. p. 85.

(2) Clarke's Praxis, tit. 118, 119, &c.

(3) Burrow, 950.

(4) 21 Jac. I. c. 16.

(5) Rep. 42 & 43 Vict. c. 59.

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issuing of a *subpœna* before bill filed, effectually decides what is the commencement of a suit in equity; *before that statute, *lis pendens* originated from the *teste* of the *subpœna*, not from the filing the bill: *Pigott v. Nowen* (1); but there has always been a wide distinction between *lis pendens* and *lis mota* (2).

II. The interest to sustain this suit must be a pecuniary interest: *Faremouth v. Watson* (3); *Hale's* case (4). No person, on account either of affinity or consanguinity, can sustain such a suit; the interest in the status of the children of the marriage is not sufficient; a pecuniary interest, which alone is sufficient, is not relied on by the respondent: *Turner v. Meyers* (5). Suits of this nature are comparatively modern: *Duchess of Kingston's* case (6); *Harvey v. Collins* (7); *Compton v. Bearcroft* (8).

The criminal proceeding has been almost entirely abandoned; the object being, not the punishment of the parties, but the dissolution of the marriage.

There is no analogous proceeding to this at law. The action by a father for the seduction of his daughter, or a master for that of his servant, is essentially different; for in those cases the service of the party must not only be declared, but it must be proved: in neither case does the right of action proceed on the relation of the parties to each other, but on the services which they are bound to render, and the loss of those services is the gist of the action.

Mr. C. Austin:

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The term "depending," adopted by the Legislature, is strictly technical, and is used in such a sense as to *imply the *litis contestatio* of the civil law. If the words were, "shall have been commenced, and be depending," there would have been no doubt, for I admit that there was a suit commenced. As respects the canon law, the word *lis* is *secundum subjectum*, and is equivalent to our word suit. The *lis* begins from the return of the citation, but the *litis pendentia*, or *lis pendens*, is not until the Court

- (1) 3 Swanst. 534.
- (2) Bac. Ordin. 12.
- (3) 1 Phil. Rep. 355.
- (4) 5 Co. Rep. 51.

- (5) 1 Hagg. Const. Rep. 414.
- (6) 20 State Tri. p. 355, 378.
- (7) A.D. 1772.
- (8) Buller, Nisi Prius, 114.

begins *cognoscere causam*; the *litis contestatio* is where the cause has actually commenced, and the parties are at issue.

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In providing for the limitation of suits, the words generally used by the Legislature are “commenced” and “sued”; in the statutes for the limitation of real and personal actions, these, or words of similar import, are invariably found; thus the 32 Hen. VIII. c. 2, s. 7 (1), provides, that where parties shall have any of the suits or actions mentioned in the Act depending, or shall sue, commence, make, or bring any of the writs or actions, such parties shall have the same advantages as they might have had before the making of the statute. The Act 21 James I. c. 16, provides, sec. 1 (2), that writs of *formedon* shall be sued or brought within 20 years; and the same words are used in the subsequent clause, sec. 3, for the limitation of personal actions. The statute 4 Anne, c. 16, s. 12, enacts that all suits, &c. for seamen’s wages which shall become due “shall be commenced and sued within six years next after the cause of such suits or actions shall accrue, and not after.” And in the Act for quieting possession, 9 Geo. III. c. 16, the Crown is expressly disabled from impleading for any manors, where the title hath not accrued “within the space of sixty years next before the filing, issuing, or commencing of every such action, bill,” &c. The same words are *used in the 31 Eliz. c. 5, s. 5 (3), for the limitation of penal actions. So also in the Statute of Pardon, 35 Eliz. c. 14 (2), *Franklin’s* case (4); *Gilbert Littleton’s* case (5), excepting all penalties for offences therein named, whereof or for which any suit, action, bill, plaint, or information at any time before, &c. within eight years next before, &c. had been or should be exhibited, commenced, or sued, &c. There are many other statutes which might be cited, all tending to shew that the Legislature has uniformly distinguished between suits depending, and suits commenced.

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The effect of these words is, that statutes of limitation always begin to run from the commencement of the suit, and hence

(1) Rep. S. L. R. Act, 1887.

(4) 5 Co. Rep. 46.

(2) Rep. S. L. R. Act, 1863.

(5) *Ib.* 47; see also *Drywood’s*

(3) Rep. in part, 11 & 12 Vict. case, *ib.* 48.

c. 43, s. 36.

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In pleading *lis pendens*, or *autre action pendant* at law, if it be in abatement, it is necessary that the plea should aver that a bill has been exhibited, or declaration filed; but if it be in bar to a penal action, it must aver that a writ has been sued out, for it must shew the very commencement of the suit: *Sperry's case* (1); *The Queen v. Harris* (2).

By the law of Scotland an action is only depending when the summons is executed; and an inhibition upon a depending action is not issued but upon production of the summons duly executed (3).

[*367] In Chancery the *lis pendens*, even before the statute *of 4 Anne, c. 16, commenced only from the filing of the bill (4): *Hawkes v. Champion* (5).

The plea of a suit depending must aver that there have been proceedings in the suit (6).

II. This is purely a civil suit, for the purpose of declaring the status of the parties; and the first question is, can Mr. Ray, in his character of the father of this lady, sustain such a suit? The citation states him to be a person interested in the legitimacy or illegitimacy of the issue of the marriage; but if he abstain from bringing the suit at all, the issue must be legitimate, for the marriage was celebrated before the passing of the Act 5 & 6 Will. IV. c. 54, and if he succeed in the suit he bastardizes the issue; if, therefore, the legitimacy of the issue of the marriage is his object, his real interest is to uphold the marriage.

But what interest, speaking legally, has Mr. Ray in the legitimacy of the offspring of this marriage—in the status of his grandchildren? He has absolutely none. If a child of full age be living in open prostitution, the father can have no writ of *habeas corpus*, nor can he have an action for taking away any of his children except his heir: *Brown v. Dennis* (7).

(1) 5 Co. Rep. 61 a.

218; 12 Bac. Ord.; Bea. Ord. in Ch. p. 7.

(2) Cro. Eliz. 221; Bac. Abr. tit. Abatement, N.; Chitty's Pleading, vol. 1, p. 393; vol. 3, p. 903, 996, ed. 1825.

(5) Carey, 51, *et ib.* 63 and 66; Toth. 28—37; 2 Collectanea Juridica, 150, 151, &c.

(3) 2 Bell. Com. 150; Law Dic. tit. *Lis pendens*.

(6) Mit. Plead. 246.

(4) *Anon.*, 1 Vern. 318; For. Rom.

(7) Cro. Eliz. 770.

A husband suing on behalf of his wife, a father on behalf of his infant child, or a guardian *ad litem* on behalf of his ward, is in a representative character, and not because they have any interest. This is the principle of the common law. The Court of Chancery acts only as a trustee, and cannot interfere with the *infant's power over his personal estate: *Ex parte Phillips* (1).

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The doctrine of the *patria potestas* has been utterly abolished by the canon law, which is the authority here, so far as it has not been overruled (2): *Ratcliffe's case* (3); *Caudrey's case* (4).

According to the canon law the marriage would have been legal without the consent of the parents.

The maxim of the civil law, that the child was in fact the father, was abrogated in the 11th century; from that period it has been uniformly held, that the father, *quà* father, has no interest in the child, with respect to matrimony, even though the child be under fourteen (5).

That was the state of the canon law in England up to the time of the separation of this country from the see of Rome (6).

The father had no power to annul the marriage, nor could he have ravishment of ward (7). The same rules applied in Scotland, and have prevailed wherever our laws have been adopted (8).

The Act 26 Geo. II. c. 33 (9), first gave the father authority over the marriage of his child: by the 11th section, marriages solemnized by licence without consent *of parents or guardians, the parties being under age, are declared absolutely void (10).

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Butler v. Dolben (11) was the first case after that statute, and it was there decided that it is under the equity of the statute that a father is permitted to sue to dissolve a marriage contrary to the canonical rules; such authority is, however, confined by the

(1) 12 R. R. at p. 153 (19 Ves. 122).

(2) Swinburn, Mat. Cont. sec. VI. IX.

(3) 3 Co. Rep. 37.

(4) 5 Co. Rep. 1.

(5) Greg. Dec. lib. VI. tit. 2, c. 3; Gloss. *ib.*; Gaili. lib. II. obs. 95, p. 480; Princip. Jur. Can. Boehmer, lib. III. s. 3, tit. 3, § 368; Cor. Jur. Can. lib. II. Gloss. "In-

fantes," "Ejus"; Tractatus Universi Juris, tom. IX.; Cor. Jur. Civilis, Dig. Accursius, tom. I. lib. 4, tit. 4.

(6) Coun. of Trent, s. 24, c. XI.

(7) Com. Dig. tit. Guardian, H. 3.

(8) See Chancellor Kent's Com. 2 vol. p. 73.

(9) Rep. 4 Geo. IV. c. 76, s. 1.

(10) 1 Blac. Com. 452.

(11) 2 Lee, Ecc. Rep. 312.

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Act to the period of minority; what interest then can he have when the parties have attained their majority?

By the civil law no one can commence a suit unless he has an interest; this principle is recognised both in the Commentaries of Innocentius (1) and Alciatus (2).

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And the kind of interest requisite is *speciale interesse* (3).

III. The origin of this sort of suit in the Ecclesiastical Court may be gathered from a passage in the Institutes of Lancellottus (4); and the principle is, that no person shall

(1) Innocentius IV. Com. Greg. Dec. lib. II. tit. 3, de Libelli oblatione, cap. 1, pl. 6. "In libello debet contineri causa, vel actio ex qua agitur. Ipsam autem non potest dimittere; sed et libellum obtulit, necessario habet ipsum prosequi, nec potest poenitere, nec se retrahere, quin reo de *interesse* suo satisfacere teneatur nisi et reus consentiat—nec etiam causam mutare, nisi primam dimittat."

(2) Alciatus, Legista "De pactis." "Huic que annotant doctores eum, cujus amplius *interesse* desinit à iudicio repelli. Hac enim *exceptio*, tua non interest, ante litem contestatam, ut de ejus naturâ est, apposita, agentem à limine iudicii summovet" (a). "Nam sicut à principio agere is non potest cujus non *interit* (b); ita si ex post facto res ad eum casum deveniat à quo nequit incipere (c). Idemque de exceptione dicendum ut is solus cujus interest excipere potest (d). Actio nihil aliud est quam jus persequendi iudicio id quod sibi *debetur* (e): non potest

aliquis ad hoc solum agere ut alii noceat nec sibi prosit." "Impossibile est quod oriatur actio ex quo nihil debetur parti" (f). "Appellatione '*interesse*' quantumcunque generali non venit nisi damnum emergens vel lucrum cessans" (g).

(3) Greg. Dec. lib. V. tit. 1, "De accusationibus," cap. 17. "Quando agitur civiliter non agitur, nisi *ratione speciale interesse*: quod ex ipsa definitione actionis patet sive de crimine agitur puta furto vel simili, sive de pecuniaria causa agitur puta ex empto, vel deposito, vel simili; nisi in popularibus actionibus (h) ubi agitur civiliter et tamen speciale *interesse* non prosequitur: tamen potest dici quod in populari actione speciale *interesse* prosequitur universitates cujus nomine agitur: quando autem criminaliter agitur, nullum proprium *interesse* prosequitur sed tantem poenam imponi accusato, sive vindictam, sive ultionem."

(4) Inst. Jur. Can. lib. II. tit. 15, "Qui matrimonium accusare vel contra aliud testificare possunt."

(a) Bart. ff. de ineff. test.; Lex Posthumus, sect. "si quis ex his."

(b) ff. Ad Senatus Consult. Trebell. lex "si patroni;" sect. 2, "qui fidei com."

(c) ff. De verborum obligationibus, lex "si sub una," sect. 1.

(d) ff. Ad Senatus Consult. Trebell. lex "à quo," sect. "si de testamento."

(e) Dig. Inst. tit. VI.; ff. De rei venditione, l. "In fundo;" Barth. l. "Edita;" Cod. "De edendo."

(f) *Ib.* p. 168.

(g) *Ib.* p. 169; Gloss. Barth. Bald. et al. l. "Unica;" Cod. VII. tit. 47, "De sententiis quæ pro eo quod interest proferuntur."

(h) Vide Gothofred. Dig. de popularibus actionibus; Bart. idem.

accuse the marriage, unless he has "*interesse*," a distinction being taken between absolute and respective interest. Thus, during the lives of the husband and wife, the parents of neither party could attack the marriage; but after the death of one of the parties to the marriage, the relations, though *collateral, might attack it, subject, however, to any interest the relations of the deceased party had to revindicate the marriage. It amounted to this, that the issue of the marriage might be bastardized after the death of one of the parties to the marriage, but not during their lives (1).

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In France, previous to the Code Civil, under the ordinance of Blois, Art. 40, and the declaration of Louis XIII. of 16th November, 1639, the marriage of minors, without the consent of parents, was void; but if, after the son attained majority, he married before thirty, or the daughter before twenty-five, though they were subjected to be disinherited, yet the marriage was valid (2).

In the time of Edward III. the contest arose between the spiritual and temporal Courts respecting the bastardizing the issue of a marriage contracted contrary to the ecclesiastical law, when the Court of King's Bench, for the first time, decided that, after the death of either of the parties to the marriage, no suit could be entertained, the object of which was to bastardize the issue, and granted a prohibition against the prosecution of such suits (3). The Court, however, would not exercise this interference during the lives of the parents; and hence arose the distinction between marriages void or voidable: *Kenn's case* (4). Respecting the making valid the marriage, the case was different, for all persons

Tit. § 2, "Ad accusandum matrimonium, non ex causa delicti soli conjuges admittuntur. Hoc dicit, sed nec omnes ad accusationem, testimoniumve dicendum admitti debent: nam si de tali impedimento agendum sit, quod neque conjugium in se delictum contineat, nec ob id matrimonium dissolvi cujusquam intersit, præterquam ipsorum conjugum, (ut puta, si erratum in conditione status fuerit: vel si mulier ita sit ut cog-

nosci non possit: arcta, vel si frigidus, ut coire nequeat,) soli ipsi conjuges admittuntur."

(1) *Œuvres de Pothier*, 4to ed., 3 vol., p. 336, 343, et Part V. c. 1, art. 1—7, p. 443.

(2) *Pothier, Traité du Mariage*, Pt. 4, c. 1, p. 326.

(3) See cases collected temp. Edw. III.; *Harris on Adulterine Bastardy*, p. 34 to 43.

(4) 7 Co. Rep. 42—45.

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having an interest in *remainder might proceed in an action declaratory of the marriage (1) : *Hinks v. Harris* (2); *Hemming v. Price* (3).

In the criminal suit any person may proceed. Thus, in *Blackmore v. Bride* (4), the office of judge was promoted by the churchwardens of Harting; but in the civil suit the party suing must have the authority of the Ecclesiastical Court *quoad hoc*, for which purpose he must shew an interest, that is, a pecuniary interest.

It is clear that it is an interest of this kind which the appellant himself supposes necessary to support this suit; for in the additional articles some such interest is pleaded, Mr. Ray claiming to be interested in remainder in certain personal estate to which his daughter is entitled in possession, in case of her death, a single woman, without lawful issue and intestate.

But what is the nature of this interest? It is a bare possibility of succession. There is not one of the conditions which his daughter may not defeat, and that of intestacy, even at the last moment of her life. How can this, then, be said to be an interest? It is clearly not *speciale interesse*, neither is it *spes successionis*, that implies some rational expectation, something tangible and definite; it is a mere wish to succeed, a possibility against which there is every probability. Such a chance as this, for it can be carried no higher, is no legal interest, and is treated by all the writers on the civil and canon law as conferring *no right, being "*contra ordinem naturæ*," as well as "*contra bonos mores*" (5).

(1) Dyer, 368; Co. Litt. 33.

(2) Latch. R. 81; 4 Mod. R. 182.

(3) 12 Mod. R. 432.

(4) 2 Phil. Rep. 359.

(5) Alciatus, "De pactis." "*Spes alienæ hæreditatis; hujusmodi spes cum de viventis hæreditate fit à jure reprobatur: non tam in eo qui successurum de agnato credit, quam etiam in patre qui filio se successurum sperat—id enim etiam contra ordinem naturæ est; idemque in filio*

qui patri volet succedere, nam et multa interim evenire possint ne patri succedat, et ideo non tenetur etiam poenam que ei ex delicto condemnatus sit solvere legitimèque imputare. Unde filius non potest quicquam ex parentis bonis interim alienare, nec in eventu ejus mortis obligare, nec eo invito aliquo modo disponere" (a).

"Breviter distinguendum est circa spem, aut spes est approbata, aut

(a) Idem. tit. De liberis et post.

By the civil law the *verus hæres* was both heir and next of kin (1). But the expectancy of an heir, either presumptive or apparent, the fee simple being in the ancestor, is not such an interest or possibility as is capable of being made the subject of contract (2). And though the 5 Geo. II. c. 30, s. 1 (3), provides for the discovery of all the estate and effects of which a bankrupt is possessed, or to which he is in anywise interested or entitled, no expectation of this sort would pass by the general assignment to the assignees (2). So neither is heirdom or *spes successionis* a

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reprobata. Quando lex adstipit alicui spei, tunc ea habetur pro vera, et tanquam accidisset, illa spes quæ consistit in voluntate hominis non est approbata" (a).

"Quæro an valeat partum de succendo? Breviter dico quod non: nam sit contra bonos mores et ideo non valet. Ultimo quæro utrum hæreditas ejus cui successurus sum ab intestato dicatur mihi spe deberi. Videtur esse casus quod sic. In contrarium videtur et hoc est veritas. In contrarium probo: illud videtur nobis deberi spe quod non dependit ex mera voluntate alicujus: si tamen hæreditas ab intestato sit obventura ex mera voluntate defuncti, quia potest testari et alium instituere, non dicitur mihi esse spes: hoc apparet ex alio, quia de eo quod sibi competet spe hoc potest disponere, sicut de eo quod competit re, sed de ista hæreditate seu spe non potest disponi; ergo, &c. &c." (b).

"Iste est satis notis, sed breviter hoc dicit. Quod unus potest ad successionem alterius venire, in æstimando interesse non debet inspicere:

Nota, quod non debet haberi æstimatio illius spei quod quis potest alteri succedere—et licet appelletur spes non est legitima. Ratio est *nullum est jus fundatum in re*—nec filius habet jus in hæreditate patris, patre vivente. Sed si haberet aliquam spem de jure de præsentis ex contractu conditionali, tunc dico quod ista spes inspicitur—et ideo dico, quod si in contractu apponuntur ista verba, 'Remittit omne jus quod habet vel habere sperat in tali re,' tunc videtur remittere omne jus quod habet de præsentis vel habere sperat in futurum ex causa de præsentis: alias non dicitur spes quæ non est fundata de præsentis" (c).

Spes quidem est ac dici potest successionis, verum ea spes illegitima est (d).

(1) Dig. lib. VII. tit. 4; 2 Voet. Comment. p. 234; Compend. 120, &c.; 2 Ferriere Inst. p. 10; Vinnii Inst. lib. II. tit. 4, p. 344, 345.

(2) *Carleton v. Leighton*, 3 Mer. 667—671.

(3) Rep. 6 Geo. IV. c. 16, s. 1.

(a) ff. Ad legem falcidiam, l. "Pretia rerum;" Bart. Cod. de Pactis, l. "De questione."

(b) Idem. ff. De liberatione legata, l. "Post emancipationem."

(c) Mynsinger, Singularium Observationum Judiciæ, 4 Cent. Obs. 26; Mervechius, Concilium, 108, No. 60;

D. Godefroi, Cor. Jur. Civ. l. "Post emancipationem;" Canon. lib. VI.; lib. I. tit. De pactis; Bart. l. "Emancipationem."

(d) Bart. idem.; Cod. lib. VIII. tit. 54; Accurtius, Dig. lib. 26, tit. 7, De administratione et periculo curato, &c.

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sufficient interest to support a suit in equity to perpetuate testimony (1); for the Court will not perpetuate testimony of a right which may be immediately barred by the defendant. Therefore, neither the next of kin of a lunatic, nor the issue in tail during the life of the tenant in tail (2), can sustain such a bill.

[*375] The same doctrine prevails at law respecting the writ *de ventre inspiciendo*, the heir apparent cannot *have it, because he is not *verus hæres*, nor can the next of kin of a lunatic, however hopeless the condition of the lunatic may be, for he has no interest whatever in the lunatic's property (3).

It was said in the Court below, that no authorities existed in the Ecclesiastical Court which decided the nature of the interest requisite to support such a suit as this; but that, I apprehend, is incorrect: the practice of the canon law must be the guide, and the rule there is, "*quando agitur civiliter, non agitur nisi spes interesse*" (4).

In *Hall's* case (5) it is laid down, that "in all cases depending between party and party in the Spiritual Court, where the suit is only *pro salute animæ vel reformatione morum*, as for defamation, or laying violent hands on a clerk, or the like, there the King's pardon is a bar to the suit; for the suit is not to recover damages or any other thing, but only to inflict punishment on the offender *pro salute animæ*; . . . but if one libels for tithes, or a contract of matrimony, or for a legacy or the like, where the plaintiff hath an interest and property in the thing in demand, and sentence shall be given for him for the thing he libels for, there the King cannot pardon it, neither before nor after the suit begun." This shews that the interest of the party, not being remittable by the Crown, is a vested and absolute interest, that is, *speciale interesse*, and is tantamount to a pecuniary interest.

[376] In *Sir Anthony Roper's* case (6), it was resolved that the words of the Act 1 Eliz., giving to the Queen power to assign

(1) Mitford Pl. 156, 157.

(2) *Smith v. Att.-Gen.* in Ch. 1777, cited 6 Ves. 255; *Allan v. Allan*, 15 Ves. 130; *Earl of Belfast v. Chichester*, 2 Jac. & W. 439.

(3) *Lord Dursley v. Berkeley*, 5

R. R. 285 (6 Ves. 251).

(4) Gregory Decretales, lib. II. s. 3, c. 1; Innocentius Commentaria de Matrimonio, P. II.

(5) 5 Co. Rep. p. 51.

(6) 12 Co. Rep. 46.

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commissioners to exercise spiritual jurisdiction, extended to crimes only, and not to cases of interest between party and party; for it was said in the fifth resolution, that if the Act had intended to give to the commissioners power to determine *meum* and *tuum*, it would be to dissolve the Court of Ordinary (1).

Now the suits above alluded to are suits having a double aspect, they are criminal as well as civil; yet if the King pardons the criminal act, the civil right remains (2). But no suit can take place in the Ecclesiastical Court unless a party has *interesse*; that was admitted in the argument by Dr. Hay in the case of *Stopper v. Davis* (3), decided in 1754. All succeeding cases in the same Court shew, that such an interest is required. In *Pertreis v. Tondear* (4), which was a cause of nullity of marriage for want of due celebration, Sir WILLIAM SCOTT says, "every person interested, who thinks there is a legal defect, may apply, and has a right to a declaratory sentence, if his application is well founded." In the subsequent case of *The Duke of Portland v. Dr. Bingham* (5), the same learned Judge held, that the Duke of Portland, as lay impropiator of Quebec chapel, could not sustain a suit to *impeach the licence to preach granted by the bishop of the diocese, because he had not a sufficient interest. In *Montague v. Montague* (6), which was a cause of divorce, the Court intimated an opinion, that where the validity of the marriage was questioned, it might permit third parties, who had estates expectant *inter alia* upon the issue of such marriage being illegitimate, to be cited to see proceedings, so far as related to the marriage. In *Nokes v. Milward* (7), Dr. SWABY, in giving judgment, mentions the case of *Faremouth v. Watson*, wherein a decree for nullity of marriage by reason of incest was given, the cause having been promoted by a party having a civil interest in the husband's estate, liable to be defeated in the event of his marriage not being impeached with effect, during the joint lives of himself and his wife, *de facto* the contracting parties. No further note of the case is to be found

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(1) See Resol. 1, 2, 3, & 4.

(4) 1 Hagg. Cons. Rep. 136—138.

(2) 3 Inst. 238; *Norwood's case*, Cro. Eliz. 684; Com. Dig. tit. Pardon, E. 1.(5) *Ib.* 157.

(6) 2 Addams, Ecc. Rep. 372.

(3) 1 Lee, Ecc. Rep. p. 641, 647.

(7) 2 Addams, Ecc. Rep. 386.

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In *Turner v. Meyers* (1), a suit for nullity of marriage by reason of insanity of the husband, promoted by himself after his recovery, former proceedings on the part of the father were not admitted, the son being of age at the time of the marriage; and in *Balfour v. Carpenter* (2), where the marriage was annulled by reason of the minority of the husband and the want of his father's consent, Sir JOHN NICHOLL, in giving judgment, says, "It has been stated in argument, that on the son's coming of age the father took no steps to dissolve the marriage. But how could he? The son being of age, the father was not competent to prosecute the suit." So that notwithstanding any supposed
[*378] *or possible interest he might have, the son being of age, the father could not sustain such a suit.

Now all these authorities shew, that the interest to support a suit for nullity of marriage must be a pecuniary vested interest, and that the claim here set up of succession in case of intestacy is not of that certain or vested nature as can entitle Mr. Ray to prosecute this suit. Some allusion was made in the Court below to the situation of the family, and it was said by the learned Judge of the Arches, that Miss Ray was not emancipated; that she had not quitted the parental roof, and that, by the law of nature, her father was bound to protect her, and had therefore a right to prosecute such a suit as this. There is no authority for the exercise of such a right; nor can any analogy be drawn from the poor law, whence the word emancipated has been borrowed. The expression is derived from the civil law, and the propriety of its use is very questionable; but, at the highest, it means only a particular state of circumstances; differing entirely from the usual and popular sense of the term, and wholly inapplicable to the status of a child of the age, and in the circumstances here existing.

The King's Advocate (Sir John Dodson):

The argument on the other side proceeds on two assumptions; first, that the Legislature has used the word "depending" in the

(1) 1 Hagg. Cons. Rep. 414.

(2) 1 Phil. Rep. 221.

strictly technical sense of *lis pendens*, and, secondly, that, according to the civil law from whence the practice of the Ecclesiastical Courts is derived, there can be no *lis pendens* until there is *litis contestatio*. Neither of these assumptions are well founded.

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The citation issued on the 24th of August, 1835, *returnable within three days after service. On the same day it was served personally both on Mr. Sherwood and Miss Emma Ray, so that it was returnable into Court on the 27th. The Act of 5 & 6 Will. IV. c. 54, received the Royal assent on the 31st: it provides that no marriage shall be thereafter annulled for the cause of affinity by sentence of the Ecclesiastical Court, unless by a sentence pronounced in a cause which shall be *depending* at the time of the passing of that Act. This is the state of the cause at the commencement of the Long Vacation; and as no step could be taken until the first court-day, no appearance is entered before the 9th of September, when it being an extra court-day, the citation is brought into Court and a proxy exhibited for Miss Emma Ray. Now the wording of this proxy is not immaterial, for although it is in the ordinary form, yet it shews clearly how the Court in which the proxy is exhibited, as well as the parties themselves, treat a cause in which the steps I have already mentioned have been taken. The proxy runs thus: "Whereas there is now depending in judgment in the Consistorial Episcopal Court of London a pretended cause of nullity of marriage by reason of alleged incest," &c. On the 14th of October Mr. Sherwood exhibits his proxy in the same form. Both proxies are exhibited without protest, and thus the parties not only themselves declare that a suit is depending, but they formally enter their appearance in the Court, and submit to its jurisdiction and authority. It is quite clear, therefore, that at this period neither party thought of availing themselves of such a defence, and I apprehend, even if it were valid, it is too late to urge it now. On the 17th of November the additional articles were *brought in, and on the 18th of January following the cause was heard, when, for the first time, the objection was taken. True it is that both the libel and additional articles were rejected by the learned Judge of the Consistory Court; but it is not pretended that the grounds of such rejection were, that the

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Court had no jurisdiction by reason that no suit was *depending*. Mr. Ray being dissatisfied with this decision, appealed to the Arches Court of Canterbury, and there again Miss Emma Ray exhibited her proxy in the same form as before, and without protest. According, therefore, to the argument on the other side, there is this anomalous state of things, that there is a cause, begun and proceeded with through all its stages up to the hearing and judgment, in the presence of all the parties interested, carried to two successive Courts of appeal without protest, and yet at this moment not depending so as to give either Court authority to decide it. A proposition involving such a position of things is, on the very face of it, untenable; but what is the practice really, as stated in the books referred to and relied upon in the Ecclesiastical Courts? In Oughton, tit. 198, "*De Citatione in Causâ Matrimoniali*," it is thus laid down, "*Si agens in causâ matrimoniali credit, vel dubitat partem ream citandem velle (lite pendente) ad alia vota convolare (id est cum alio aut contrahere aut solemnizare matrimonium) curare potest ut in citatione inseratur inhibitio, contra partem ream, ne (lite hujusmodi pendente) covolet ad alia vota, matrimoniumve aliunde quovismodo contrahat, et quod si, de facto antea contraxerit (id est; ante executionem citationis) illud, in facie Ecclesiæ, solemnizari non procuret, sub pœnâ juris et contemptus.*" So that, in a proceeding in *causâ matrimoniali*, *if the party against whom the suit is instituted "*lite pendente*" enters into a contract of marriage with another person, the other party has a remedy, and this *lis pendens* is not only before *contestatio litis*, but *ante executionem citationis*. Again, in tit. 201, "*Si mulier contra quam agitur, in causâ matrimoniali, non obstante pendentia litis et inhibitione (quod, lite pendente, non convolaret ad alias nuptias), matrimonium solemnizaverit, vel matrimonium contraxerit cum alio; hoc allegato, et probato, est sequestranda (sumptibus petentis) lite pendente;*" and there are several other parts of the section *De Causâ Matrimoniali* which speak of a breach of the inhibition "*pendente lite*." In title 31, "*De Contemptu*," it is thus stated, "*De modo petendi decretum in negotio contemptus, in causâ matrimoniali; nempe propter solemnizationem matrimonii (pendente lite) inhibitione*

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judicis in contrarium non obstante." Again, after reciting the issuing and serving of the citation with inhibition, it proceeds: "Quodque (vestris litteris inhibitoriis, et executione earumdem, non obstantibus) ipsa, post executionem earumdem (in contemptum juris, et jurisdictionis vestræ, non ferendum) matrimonium quoddam præensum (de facto) contraxit, cum quodamvis et illud, in facie Ecclesiæ, solemnizari, seu potius profanari curavit." It appears, therefore, that, with reference to the customary form of the instruments in the proceedings in the Ecclesiastical Court, as well as the authority of Oughton, who is relied on as the general authority for the practice in those Courts, that the *contestatio litis* is not necessary to constitute a *lis pendens*, and that there may be "a suit depending in the Ecclesiastical Court," before *contestatio litis*; that the *lis pendens* commences with the extracting *and service of the citation, or at furthest on the return of the citation whenever it may be.

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There is no question but that this marriage is contrary to the canon law. By the 99th canon of 1603, "It is ordered and directed that no person shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority in the year 1563; and that all marriages so made and contracted shall be judged incestuous and unlawful, and consequently shall be dissolved as void from the beginning, and the parties so marrying shall by course of law be separated." And by the first table of the degrees of marriage set forth in the year 1563, it is expressly ordered, "That a man may not marry his wife's sister." The recent Act of Parliament has therefore only declared that to be the law which was previously in force, making, however, such marriages which were before only voidable now absolutely void. Previously to the canon of 1603, by the law of the Ecclesiastical Court, these marriages were void *ab initio*, when sentence was pronounced, and might be dissolved even after the death of one of the parties to the marriage (1). In the time of William and Mary the Court of King's Bench for the first time interfered, and granted a prohibition against the Ecclesiastical Court's proceeding to annul a marriage between the parties after the death of one of them, because it was to

(1) Bancroft, Articuli Cleri, 2 Inst. 614; 2 Jas. I.

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bastardize and disinherit the issue, but it did not prohibit the Ecclesiastical Court from punishing the survivor for the incest (1).

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Subject to such interference the law has ever since remained ; and a sentence of nullity pronounced by the *Ecclesiastical Court must, in order to be valid, have been pronounced in the lifetime of both the parties to the marriage. This is recognised in the preamble to the statute of 4 & 5 Will. IV. c. 54: "Whereas marriages between persons within the prohibited degrees are voidable only by sentence of the Ecclesiastical Court, pronounced during the lifetime of both the parties thereto; and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period; and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity should be *ipso facto* void, and not merely voidable."

The object of the statute is to declare the status of the children of such marriages as have already taken place, and to provide effectually against any future marriages of this kind; but it never can be intended to give indemnity to the parties guilty of such a marriage, or to interfere with the powers still possessed by the Ecclesiastical Court to punish the incest.

The question then is, Can Mr. Ray, in his character of the father, sustain this suit? It has been insisted upon at great length, and with infinite learning, that Mr. Ray has no interest which can give him a *locus standi* in the Court; that he has not any pecuniary interest. Now, presuming that the argument was right, so far as the numerous authorities have been cited, and that, in order to sustain a suit, there must be *speciale interesse*, it is no where proved, or even laid down, that it must be *interesse pecuniam*.

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There is no authority in the decisions in the Ecclesiastical Court for such a position. The case of **Turner v. Meyers* only goes the length of stating that the interest must be specific, not that it must be a specific pecuniary interest. *Pertreis v. Tondear* (2) is more general; for the learned Judge there says,

(1) *Harris v. Hicks*, 2 Salk. 548.

(2) 1 Hagg. Cons. Rep. p. 647.

[There is no such page in 1 Hagg. Cons. Rep.]

“Every person interested” may apply for a sentence of nullity of marriage. But if a pecuniary interest were indispensable, surely Mr. Ray has sufficient; his daughter is in possession of funds to which, in case of intestacy, he would be entitled. Now this is more than heirship, or *spes successionis*; for the Statute of Distributions points him out as a person entitled to succeed, whereas the rule *nemo est hæres viventis* prevents the vesting of the interest of an heir, even though in tail; and the *spes successionis* is neither a legal or equitable prospect of succession, but a mere hope, a barren expectation.

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I apprehend, however, the interest of Mr. Ray to support this suit is superior to any such technical rule; his daughter is domiciled in his house; she is part of his family, receiving from him the care and protection which he, as her father, as well as the head of his family, is bound to afford her; and though she has reached the age of maturity, she has not assumed its privileges, or asserted its rights. In such circumstances a father is bound to counsel, advise, and protect his child; and if that is a moral obligation, which no man will be bold enough to deny, he has such a moral and, as it has been termed, natural interest in the welfare of his child, that he may come into a Court and claim to be heard to dissolve a marriage alike contrary to the laws of God and man. The welfare of his family, the status of his children, the interests *of society, require that he should not only have, but that he should vindicate such a right.

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[Their Lordships intimated their opinion that the word “depending” must be taken in its popular and general sense, and that the suit was properly before the Ecclesiastical Court at the time of the passing of the Act.]

Mr. Serjeant Wilde :

The Court having disposed of the question of jurisdiction, it remains for me only to apply myself to that part of the case which respects the capacity of Mr. Ray to institute this suit.

In order to ascertain the nature of this kind of suit we must look, not only to the object of the suit itself, but the jurisdiction from which it proceeds. It is insisted on the other side, that the suit is purely a civil suit, for the sole purpose of ascertaining

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the status of the parties. To a certain extent that is true ; but the jurisdiction of the Ecclesiastical Court extends farther, and the suit is, in fact, both criminal and civil ; and though the proceedings may be distinct, it is impossible to argue that they are unconnected, for the civil suit proceeds on the very assumption that there is ground for the criminal process. It is admitted, that though all the world have an interest in upholding the morals and decorum of society, and may therefore maintain the criminal suit, yet that none but the parties to the marriage have an interest in the status of the marriage, and, consequently, that they only can maintain the civil suit. But the status of marriage is one in which all mankind are interested, *the very existence of society depends on its being duly regulated and ascertained, and that consideration alone might seem sufficient to support this suit. It is true, that to support the criminal suit there must have been cohabitation as well as marriage ; but the law presumes that, wherever a marriage has been solemnized, and though it is well known and admitted that in this case no cohabitation has taken place, Miss Ray never having left her father's roof, yet it is pleaded in the very first article of the libel, and would be legally presumed if it were not stated : *Patrie v. Patrie* (1). Now, suppose the argument of my friend's well founded, and that the father has no interest to dispute such a marriage as this, but can only proceed like the rest of the world to punish for the criminal act. In what situation is he placed ? Is he to stand by, to witness his daughter's dishonour, to see her commit an illegal, immoral, and irreligious act, to wait for its very accomplishment before he can take any step to repair it, or prevent its further commission, and be told all the while that he has no authority to interfere, though his child be under his own roof, and by all the ties of nature and law he would be bound to defend her ? But this is not all : if this marriage is valid, Mr. Sherwood has a right to the *consortium* of his wife, and may institute a suit to compel her to cohabit with him, to commit, in fact, the very offence which forms the criminal charge, yet the Ecclesiastical Court, and even this Court, must, if the cause was brought before it, issue its fiat

(1) 3 Phil. Rep. 496.

and thus be accessory, nay, the very instrument to effect that, which, as soon as accomplished, the same tribunal may be called upon to punish !

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This suit springs out of the ancient suit of jactitation, *Duchess of Kingston's* case (1), which, though of rare occurrence, is still recognised by the Ecclesiastical Court: *Hawke v. Corri* (2).

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There is no species of suit, except that for alimony, known to the Spiritual Courts, where pecuniary interests are the objects of the jurisdiction. Their functions are chiefly for the protection and furtherance of religion and morals. How then can it be argued that the Spiritual Court requires a pecuniary interest, and that the father, *quà* father, without such an interest, has no *locus standi* to support such a suit as this? I deny that such a rule ever existed; but if it did, it is in effect abolished by the statute 26 Geo. II. c. 33, which recognises and enforces the right of a parent in the marriage of his child; and supposing the argument respecting the canon law so much insisted on to be correct, that statute has in effect abrogated the canon law, by recognising and giving express authority to the father in the marriage of his child. I speak of the spirit and effect of the statute, not its legal operation, that I allow is limited; but for the purpose of the argument, the statute proves the abolition of that law, if it ever existed here, which made the child sufficiently independent to contract an illegal and incestuous marriage, without any power in the parent to oppose or question it.

If the suit be only for the purpose of ascertaining the status of the parties, the father has, of all persons, the greatest interest in that question, and that is the sort of interest which I contend is intended by the learned Judges who, in the *dicta* they have delivered, say, "any person interested."

The term "interest," in its legal and purely technical sense, is definite and distinct, and applies to some ascertained and tangible right; but as applied to jurisdiction it has a wider meaning, and extends to moral as well as legal obligations (3)—is merely such as will give a party a *locus standi*; an interest of this kind is familiar to our law, and is recognised

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(1) 20 State Tr. 355.

(3) Craigh. Jus. lib. 2.

(2) 2 Hagg. Cons. Rep. 284.

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in every action brought in the Courts of Exchequer or Common Pleas.

Now blood is an interest sufficient to support a suit. "*Persona conjuncta æquiparatur interesse proprio*" is a maxim of law (1); and the comment upon that maxim by Lord Bacon is, that "the law hath, in this, respect of nature and conjunction of blood, as in divers cases it compareth and matcheth nearness of blood with consideration of profit and interest, yea and in some cases alloweth of it more strongly."

Here is *interesse*, not *interesse speciale*, which is a mere feudal interest unknown to our law (2). But the interest of blood; the natural tie is recognised not in this maxim alone, but in various other instances; thus, between father and child, blood is sufficient consideration to raise a use: *Grey v. Grey* (3). So the word "privies" in the statute 4 Hen. VII., for barring estates tail and levying fines, is construed to be to privies in blood as well as privies in estate (4).

Again, the heir may maintain an action for its being reported that he is a bastard, though he allege no special damage.

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In the action for criminal conversation, one of the allegations is that the husband has been deprived of the comfort, society, and fellowship of his wife, and of her aid and assistance in his domestic affairs.

In the action by a father for the seduction of his daughter, though the allegation that gives jurisdiction is the loss of service, yet proof of the smallest possible act of service was sufficient; and of late it has been held that it is sufficient to shew the daughter under the general control of the father without proving any service: *Maunder v. Venn* (5).

Now all these instances prove, beyond controversy, that there are other interests than pecuniary ones, recognised and sanctioned in our Courts, and that blood forms one of the strongest.

In *Brown v. Ricketts*, Lord STOWELL says, the father can institute this suit because his authority is violated; the observation, as to interest, in *Turner v. Meyers* is *obiter dictum*.

(1) Bacon's Maxims, regula XVIII.

(4) Touch. 21.

(2) Craigh. Jus. lib. 2.

(5) 31 R. R. 734 (Moo. & Mal.

(3) 1 Ch. Ca. 296; Touch. R. 341.

323).

The case of *Watson v. Faremouth* (1) is directly in point, and entirely overrules the authority of *Balfour v. Carpenter*. In that case, the sisters, who were devisees in remainder, in case there was no issue of the marriage, were allowed to prosecute the suit. The Ecclesiastical Court has no jurisdiction to determine the validity of devises, and could not, therefore, determine whether the parties had, in fact, any interest; yet upon the allegation of an interest, which may turn out utterly untenable and unfounded, they are admitted to prosecute the suit. Is that more than requiring the party to allege something which will give him a *locus standi*?

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Mr. Ray claims and shews a higher interest than this; though contingent, it is definite and certain, *and must accrue if not defeated; it is a *spes successionis*—may be subject of contract, and if so, is enforceable in a court of equity (2). But in a case where it is assumed that a pecuniary interest is requisite, but at the same time admitted that the smallest quantity of interest is sufficient, I have a right to enlist any interest. Mr. Ray may maintain an action for the maintenance of his daughter since the marriage; this is a pecuniary interest.

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Dr. Addams, in reply:

The term incestuous, as applied to this marriage, is improper, and ought not to weigh with the Court. It is not an incestuous connexion; were it so, every act of cohabitation would be the commission of a crime which is legalised and sanctioned by the recent Act of Parliament. The prohibition against such marriages in Scripture is *vexata quæstio*; and the assertion that they are against the law of nature, is contrary to all the books which treat of such laws (3).

The assumed invalidity of such a marriage was the very hinge upon which the Reformation turned, and was urged by Hen. VIII. as the ostensible reason for the divorce from Catherine of Aragon. But the foreign reformers were, at that time, divided in opinion

(1) 1 Phil. Rep. 355.

(2) *Lord Dursley v. Fitzhardinge Berkeley*, 5 B. R. 285 (6 Ves. 251).

(3) *Grotius de Jure Belli et Pacis*,

B. II. ch. v. s. 13; *Parson's case*, 2 Co. Litt. 235 a; *Wortley v. Watkinson*, *ib.* et *Levinz*, 245; *Snowling v. Nursey*, *ib.*; *Vaughan*, 302.

SHERWOOD as to the legality of the plea; and the question was settled for
 v. a time, in the only way it could be satisfactorily, by the Act
 RAY. 25 Hen. VIII. c. 22 (1).

[*391] That was the first and the only statutory prohibition of these marriages, and was repealed by the subsequent *Acts of 28 Hen. VIII. c. 7, and 1 Mary, sess. 2, c. 1, which latter declared the Queen's title to the throne of these realms, and recognised and sanctioned a marriage in all respects similar to Mr. Sherwood's.

Before the late Act such marriages were, in fact, valid; they could only be questioned or dissolved during the lifetime of the contracting parties (2), which clearly shews the impropriety of terming them incestuous. The prohibiting them was, in fact, only a question of policy (3).

The various Marriage Acts passed since the time of Hen. VIII. are only provisionary for the celebration, and not declaratory of the status of the contracting parties. No inference of the authority of the parent can be drawn from the consent of parent or guardian, required to the marriage of a minor by the 26th Geo. II. c. 33. The very fact of such authority being conferred, is a proof it did not previously exist; and that the rule, as stated by *Mr. Austin*, was the prevailing law.

Though there has been neither cohabitation nor consummation of this marriage, yet it must be presumed; and if not proved, the cause would be dismissed (4). The Ecclesiastical Courts pronounce hypothetical sentences, as, if the marriage has taken place, it is void (5). As to the interest requisite to sustain the suit, the whole argument on the other side, as well as the libel, entirely proves that a pecuniary interest is the one claimed by Mr. Ray. There is no authority for holding that the remote expectancy, in case of the intestacy of his daughter, and her being a *single woman, is sufficient pecuniary interest to support a suit. *The Earl of Belfast v. Chichester*, and *Smith v. King* (6),

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(1) Burnet's Hist. of the Reformation, Append., p. 125 below.

(2) Innocentius, Institutiones Canonici, 1 vol. 432.

(3) Paley, tit. Incest.

(4) *Griffiths v. Read*, 1 Hagg. 195.

(5) *Nokes v. Milward*, 2 Addams Rep. 386.

(6) [Probably *Smith v. Attorney-General*, 5 R. B. 288, 289 (6 Ves. 260, n.) is intended.]

are directly against such a position ; and all cases go to shew that *spes successionis* is not a pecuniary interest. With regard to the argument derived from the poor law, that is arbitrary and wholly inapplicable ; it is, in fact, but another form of the *patria potestas*, depending on the accident of the daughter living under the same roof as her father. If she changed her residence, there would be an end of the reason, for she would then be emancipated, and, being of age, might gain a settlement in any other parish. If, again, the father has pecuniary interest, because he might be chargeable for the children of the marriage, every rate-payer in the parish is also liable, and might sustain this suit. Such a proposition is, on the face of it, untenable.

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Their Lordships, having taken time to consider their judgment, directed the case to be again argued by one counsel on each side upon the following point :

Nov. 28.

Whether the liability to be charged under the Act 43 of Eliz. c. 2, for the maintenance of the children of the marriage, in case of the death or impotency of the parents, was a sufficient interest in Mr. Ray to entitle him to sustain a suit of nullity of marriage in the Ecclesiastical Court ?

Mr. Austin contended that the poor law was merely a municipal regulation imposing liabilities, not creating any interests adverse to those as previously existing under the common or statute law. That the liability in respect of the unborn issue of the marriage was only *a possible and contingent burden, depending, first, on the impotency or death of the parents and the paternal grandfather ; and, secondly, on the children becoming chargeable on the parish : that such contingent liability created no present, or certain, and therefore no legal interest, but was only a "*metus damni*," not affecting the person or reaching the property of Mr. Ray—incapable of being released, and only enforceable by imprisonment ; that the same species of interest was possessed by every rated inhabitant of the parish in which children might be settled ; and that to admit Mr. Ray to sue in respect of such interest, would be to allow every marriage to be questioned by each individual rate-payer. He cited *Rex v. Kempson*, 2 Str. 955 ;

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SHERWOOD 1 Bott. 450; 2 Nol. P. L. 231, 232. *Hoe's case*, 5 Co. Rep. 70;
 RAY. Cro. Eliz. 579, 580; Co. Litt. 265 e. *Neale v. Sheffield*, Yelverton,
 192; Brownlow, 110; Bac. Abr. tit. Release; Vin. Abr. tit.
 Release, D., Possibility, C. *Turner v. Felton*, 1 Addams; 2
 Phil. Ecc. Rep. 94, *vide ib.* 330, 344. *Rex v. St. Peter's, Dorset*,
 Burr. 513. *Rex v. Reading*, Rep. temp. Ld. Hardwicke, 79; 8
 East, 196 (a). *Cope v. Cope*, 42 R. R. 787 (1 Moo. & Rob. 269).
Halford v. Kymer, 34 R. R. 553 (10 B. & C. 724).

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Sir William Follett, on the other hand, insisted that the smallest possible interest in Mr. Ray was sufficient to sustain this suit; that there was no direct authority for saying that such interest must be pecuniary, but was such as is admitted by all the Courts, both temporal and spiritual, to subsist between parent and child; that this species of interest is identical with that recognised by the poor law, which gives a settlement to the child, derivative from the parent *and the Marriage Acts, which require the consent of parents previous to the grant of a licence; that as a man has an interest to be released from the obligation of maintaining the bastard issue of his reputed wife, and is permitted to prove the illegality of the marriage, so a grandfather has the same interest, and, if a pecuniary interest is requisite, such is sufficient to sustain this suit; that the contingency or remoteness of the liability formed no objection, Mr. Ray having always a present interest to be released from the possibility of a future obligation. He cited *Butler v. Baldwin*, Lee, Rep. 312—318; *Bowzer v. Ricketts*, 2 Hagg. Consist. 213; *Turner v. Meyers*, 1 Hagg. Consist. Rep. 414; *Faremouth v. Watson*, 1 Phil. 355; *Rex v. Cornish*, 36 R. R. 639 (2 B. & Ad. 498); *Rex v. Bramley*, 6 T. R. 330, 331; *Rex v. Chillesford*, 4 B. & C. 94, 102.

PARKE, B. :

Dec. 6.

This case was argued before us in the month of February last, and again a few days ago, with great ability and learning on both sides. Its importance to the public, and its deep interest to the parties, demanded from us our most serious attention before we pronounced our opinion upon it; we have bestowed that attention, and though we have felt some doubt in forming our

opinion, we have come to the conclusion that the judgment appealed against ought to be affirmed. SHERWOOD
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Having had the benefit not only of a most able argument before us, but also very full notes of the judgments of both the Courts below, their Lordships are now called upon to pronounce their opinion upon the question in this most important case.

There are two questions; first, whether this case *is within the exception of the Act of Parliament? and, secondly, if it be, whether the respondent is entitled to sue in civil form to have this marriage annulled? [*395]

The first question depends upon the construction of the Act, whether at the time of the passing of the Act this suit was "depending," for if it was, sentence may be pronounced for annulling this marriage, otherwise it cannot; the second is wholly independent of it, and must be determined upon the same principles as if the Act had never passed.

Much learning and research was displayed in the argument before us as to the meaning in the Ecclesiastical Court of the technical term "*lis pendens*," in which sense it was insisted that the words of the statute must be understood. We think it unnecessary to examine the authorities cited on this subject, because we are clearly of opinion that the words of the Act are not to be construed in any other than their ordinary and popular sense, that is, that a suit should have commenced and should be still continuing, the object of the Legislature being to preserve entire their rights to such parties as had already used diligence and taken proper steps to enforce them. On this question we have the satisfaction of knowing that our judgment agrees with that of both the learned Judges in the Court below.

The second and more difficult and important question is, whether in this suit, which is thus taken out of the operation of the Act, the Court ought to pronounce for the prayer of the respondent, and to annul the marriage between these parties? That marriage having been celebrated between persons within the Levitical degrees, and prohibited from intermarrying by Holy Scripture, as interpreted by the canon law *and by the statute 25 Hen. VIII. c. 22, s. 3, was unquestionably voidable during the [*396]

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lifetime of both, and might have been annulled by criminal proceedings or civil suit. The suit in a criminal form is to punish the parties by public penance, and to declare the marriage void *ab initio*; it may be instituted by any one promoting the office of judge, with the permission of the Court, though the prosecutor be wholly unconnected with the parties, and this is the only case of nullity of marriage to which it is applicable. In all other matrimonial causes the suit must be in civil form. Civil suits may, beyond doubt, be brought by either of the parties, who have each the greatest interest that their status should be determined, and that they should be freed from the bonds of an incestuous intercourse.

The only point to be considered is, whether it is maintainable at the suit of the father? It is evident on all hands that a third person suing in civil form must have an interest of some kind; for the object of the suit must be to procure the marriage to be avoided on the ground that its validity may affect some right, or interest of the party promoting the suit. It can hardly be that the Court has a discretion upon this subject, to allow a civil suit to be maintained or not, according as it is of opinion that the justice of the case, or the advantage of the public, will be best answered.

There must be some rule, according to which the party may sue or not, as a matter of right. But if the interest be established, the mere question of that interest, must on legal principles be wholly immaterial. If there be an interest, however small, a party must have a legal right to enforce or protect it, according

[*397] *to the forms of law; what then must be that interest? The Ecclesiastical Courts ought not to be extremely strict in limiting the cases, in which private individuals may seek to annul prohibited marriage by proceedings in civil form. The marriage, it must always be borne in mind, is incestuous according to the Divine law, and no complaint can be reasonably made if all persons are admitted to interpose, whose rights are affected, however remotely, by the existence of the marriage, or its probable results, the birth of offspring; and it is to be recollected that this may be the only form, in which any individual can question the marriage as a matter of right; for to promote the

office of judge in a criminal suit, requires the authority and consent of the Court, and though this is obtained without difficulty in ordinary practice, it cannot be demanded *ex debita justitiæ*.

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It appears, however, to be quite clear, that whatever be the nature of the interest required, the mere relation of father and daughter, or parent and child, though it creates the highest moral interest, does not of itself constitute such an interest as to support a suit in the Ecclesiastical Courts. At the common law certainly no action could be maintained, founded on that relation only [*Ratcliff's* case, 3 Co. Rep. 38 b]; taking away a child, unless such a child was the heir-at-law, which distinction proceeded upon a reason taken from the civil law: *Barlow v. Dennis*, Cro. Eliz. 770.

The proceedings of the Ecclesiastical Courts, however, are not governed by the rules of the common law, or any analogies which they furnish. But by maxims of the canon law, as appears from the authorities cited from foreign jurists by *Mr. Austin* in his most learned argument, the parental power and authority seems to *have been disregarded. "In causis spiritualibus non curator auctoritas patris;" and "pater non deferri videtur ab extraneo," are rules which occur often in the writings of these jurists; and this is in conformity with the spirit of the Romish Church, which abrogated the "*patria potestas*" of the civil law, and placed the parental authority in this respect in the hands of their spiritual guides; and that part of the canon law which takes away the control of parents over the marriage of their children, is undoubtedly in force in this country, the marriage of males of fourteen years, and of females of twelve, being unquestionably valid by the law of England before the Marriage Acts, with or without the consent of the parents. We have, besides, the authority of Lord STOWELL, in *Balfour v. Carpenter*, in modern times, in conformity with this view of the canon law; and in *Turner v. Meyers* that most learned Judge says, that "a father is by no means privileged, but must shew a specific interest as well as any other person." We have, therefore, to inquire whether any such interest exist in this case by which the suit may be supported.

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Three circumstances are suggested, each of which it is argued form a sufficient special interest for this purpose: the first is, that Mr. Ray was the next of kin, entitled to his daughter's personalty under the Statute of Distributions. The second, that the daughter was, at the time of her marriage, a part of his family, and an inmate of his house. The third, that by the statute law of this country the father is bound to maintain his grandchildren, if legitimate, and has, therefore, a direct legal interest to set aside the marriage, in order to liberate himself from that burden, which does not belong to him simply in the character *of a father, but is attached to every father by the municipal law of this particular country. The first of these appears to have formed the sole subject of argument in the Court below, and strong reasons are urged in the sentence of the learned Judge of the Consistory Court, for holding that the right to succeed *ab intestato* cannot be treated for any purpose as an interest; and in that respect the learned Dean of the Arches does not disagree. It is, however, unnecessary to give any opinion upon that point; nor upon the second ground, upon which the learned Dean of the Arches placed much reliance in his judgment, as their Lordships think, that upon the third ground, that of a statutory obligation to maintain his grandchildren, the father has an interest in the question of the validity of the marriage, which, although of a slight and contingent nature, is still a sufficient interest to maintain this suit. This special ground of interest does not appear to have been the subject of discussion in the Consistory Court.

The decisions of our Ecclesiastical Courts contain but little of authority on this question, as to the nature and adequacy of the interest which is necessary to maintain a suit of this kind; but the judgment of Sir JOHN NICHOLL in the case of *Faremouth v. Watson*, and of which we have been furnished with a more copious note, enables us to say, that a "slight interest" is sufficient; and it seems highly reasonable to hold, that any one whose title to property would be affected, or on whom a legal liability would be cast, though contingently, by the natural result of the marriage—the birth of issue, should have a right to contest its validity. If it were permitted to any one to

dispute the marriage, and set up the illegitimacy of the issue *at any time, it would be just to say, that no one should interfere until he should have sustained some actual loss, by being deprived of some property, or subjected to an actual pecuniary burthen, by reason of the existence of the issue, and those contingencies having occurred on which the title or obligation of the party depended. But as the law prevents any one from interfering to bastardize the issue after the death of either parent, it ought, by way of equivalent, to allow a power to those whose interests may be affected by the validity of the marriage to question it in the lifetime of both; otherwise this consequence would follow, that they might be unjustly deprived of property, or subjected to a burthen without any possible redress.

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Suppose, for instance, that a person was entitled by a will or settlement to an estate on failure of issue of a marriage, such a person would have unquestionably a legal interest to sue to have that marriage annulled, and it was so decided in the case before referred to of *Faremouth v. Watson*. The situation of a person who, instead of receiving a benefit on the failure of issue, was bound by the will or settlement to pay a sum of money in the event of the existence of such issue, a portion, for example, for the child or children of the marriage, must without doubt have a similar legal interest to sue for the dissolution of the marriage. The cases are in effect the same; it can make no difference in the legal right of the party, that the estate to be taken, or the sum to be paid, is greater or less; or that, besides the birth of issue, the title in the one case, or the obligation in the other, depend upon other contingencies, such as the attaining or dying before majority, or other events more or less remote. In all these cases justice requires that the party whose interest *may be affected should have the right to interfere, if he chooses to exercise it, before, by the death of either parent, it becomes too late.

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It appears to their Lordships, that the legal obligation conferred by the statute 48 of Eliz. c. 2, falls within the same description of interest. If there had been nothing but a mere

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moral duty in the father to support his grandchildren, it would not have been enough to found a title to sue, because a suit is brought to protect or enforce some legal right; but the statute converts the moral duty into a legal liability, to be enforced by legal sanctions.

The effect of its provisions is, that if the marriage be not set aside, the birth of a child of the marriage would impose a legal obligation on the grandfather to maintain it in the event of the child being poor, lame, or impotent, and unable to work; perhaps in that event only (*Rex v. Cornish*); but certainly in the event of the father being himself unable to support his child.

It may be that such liability is extremely unlikely in this case to cast real pecuniary burthen upon Mr. Ray; but still it is a legal liability, and analogous to the obligation of persons bound by settlement or contract to pay contingently a sum of money to the issue of the marriage.

If the husband were a pauper, then already receiving parochial relief, the legal liability would be the same, though the contingencies would be less distant; nor would it be any answer to say, that the birth of a grandchild would be a benefit to him, supposing that the grandchild would, under similar contingencies affecting the grandfather, be obliged to maintain him, because such benefit would be by no means equal to *an exact counter-balance to the burthen, and they may be extremely different; and the complainant has an unquestionable right to choose for himself, and to be relieved from that which he considers to be a burthen, though it might possibly in some events turn out an advantage.

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Their Lordships are therefore of an opinion, that there does exist such a legal interest in the father as to entitle him to set aside the marriage. It is no objection that a similar interest belongs to the mother, or to a son to set aside the marriage of his father, if he be so advised; nor that, if the liability to maintain in the event of poverty be a sufficient ground, the inhabitants of the parish in which the husband is settled might possibly have a like interest, and would have it, in case issue of the marriage had been already born, in another parish, where

they would be settled if they were illegitimate. It is no objection that the doors are opened wide to admit a numerous class of complaints against a marriage which is illegal by Divine and human law.

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Their Lordships therefore determine to pronounce against the appeal, and that the libel is to be admitted to proof, being of opinion that, upon the facts stated, Mr. Ray is competent to maintain this suit. In coming to that conclusion they have felt considerable doubt, both from the nature of the case and the small number of authorities in the Ecclesiastical Court, of this country which throw any light upon this subject; but any legal interest, however small, is unquestionably sufficient; and their Lordships think there is in this case such an interest, although of an extremely minute and contingent character.

Her Majesty will, therefore, be advised to affirm *the sentence of the Court of Arches, but without costs.

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On the judgment being pronounced,

Dr. Phillimore moved to retain the principal cause, and for an issue, and monition to the Registrar to bring in the original libel, and additional articles, and exhibits, which was granted as of course.

Their Lordships' judgment having been confirmed by Her Majesty in Council,

The *Queen's Advocate* appeared on the part of the appellant on a subsequent day, and submitted to an affirmative issue being put in; and, evidence having been taken, and publication decreed, the sentence of the Court of Arches, deciding the marriage null and void by reason of incest, was, upon the motion of the respondent's counsel, absolutely confirmed.

Dec. 16.

Reporter's Note.—As there is no definition in the above Act of the "prohibited degrees" of consanguinity or affinity, and as there is some controversy respecting the table of the Levitical degrees, a statement of the law respecting them will, it is hoped, not be thought irrelevant.

[355, n.]

The first mention of the "prohibited degrees" in the Statute Book is

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[*356, n.]

in the 25 Hen. VIII. c. 22 (1), intituled, "An Act concerning the King's Succession," which was passed to legalize his divorce from *Catherine of Aragon, and consequently bastardized the Princess Mary. Sec. 3 contains an enumeration of the degrees of marriage prohibited by God's law.

The 28 Hen. VIII. c. 7, s. 4, intituled, "An Act for the Establishment of the Succession of the Imperial Crown of this Realm," repealed that Act. This Act was passed for the purpose of legalizing the divorce from Anne Boleyn, and declaring the issue of that marriage (viz. the Princess Elizabeth) illegitimate. So much, however, of the former Act, 25 Hen. VIII. c. 22, as respected marriages within the prohibited degrees was re-enacted, with some slight modifications respecting the want of carnal knowledge of the first wife, and an enumeration of the prohibited degrees was again set forth. The remainder of the Act contained a limitation of the Crown to the issue of the Lady Jane Grey (2) by the King, and in default, to the heirs of the body of the King lawfully begotten, with a general power to the King to name his successor, either by letters patent, or his last will.

In pursuance of these powers, the Crown was subsequently limited by the King in succession to Edward, Mary, and Elizabeth, and that appointment was duly confirmed by the 35 Hen. VIII. c. 1, which recited the powers and authority of 28 Hen. VIII. c. 7, touching the succession, by the execution of which so much of that Act as provided for the succession was rendered void.

In the 28 Hen. VIII. (the same year as the second Act of Settlement (c. 7) just alluded to had passed), another Act respecting marriages was passed, c. 16, intituled, "An Act for dispensing with Rules and Licences from the Pope," whereby it was enacted, s. 2, that all marriages had and solemnized before the 3rd of November, in the 26th of the reign (the date of the Parliament held next after the passing of the 25 Hen. VIII. c. 22), should be valid, whereof there was no divorce or separation had by the ecclesiastical laws of the realm, and which marriages were not prohibited by God's law limited and declared in the Act made in that present Parliament for the establishment of the King's succession, should be good, and they were thereby confirmed. For the interpretation, therefore, of what marriages were prohibited by God's laws, this Act expressly referred to the previous Act (c. 7) of the same year in which the prohibited degrees were set forth.

[*357, n.]

The next statute respecting the "prohibited degrees" was the *32 Hen. VIII. c. 28, which provided that all marriages should be lawful between persons that were not prohibited by God's laws to marry, and that no reservation or prohibition, God's law except, should trouble or impeach any marriage without the Levitical degrees. This Act contained the first mention of the Levitical degrees as the "prohibited degrees"; it was passed for the purpose of destroying what was termed spiritual affinity, which precluded the marriage between godfathers and their godchildren, &c. &c. without licence from the Pope (3), and was confirmed by the 1 & 2 Edw. VI. c. 23, s. 2.

(1) The 25 Hen. VIII. c. 22, is printed in all the editions of the Statutes as unrepealed, and the 28 Hen. VIII. c. 7, is not printed; but it is to be found in the Appendix to Remington's Statutes, vol. 9. See also Vaughan's Reports, 215; Gibson Cod. 410, where it is partially set out.

(2) [This is of course a slip for Jane Seymour: she was never called Lady, but passed from the rank of a knight's daughter to that of Queen; she is described in the Act simply as Queen Jane.—F. P.]

(3) Co. 2 Inst. 683.

The first act of Queen Mary, upon her accession, was to declare the legality of her birth, which was accordingly done by an Act passed 1 Mary, sess. 2, c. 1, by which the whole of the 25 Hen. VIII. c. 22, was again repealed, and so much of the 28 Hen. VIII. c. 7, as went to bastardize her, or to pronounce the marriage between her father and Catherine illegal; which marriage was there declared to stand with God's law, and to be valid to all intents and purposes. The remainder of that Act, however, containing the "prohibited degrees," and the provision for the succession, was left untouched until the ensuing session, when, by 1 & 2 Phil. & M. c. 8, s. 17, so much of the 28 Hen. VIII. c. 7, as concerned a prohibition to marry within the degrees expressed in the said Act, together with the whole of the subsequent Act of that year, 28 Hen. VIII. c. 16, and the 32 Hen. VIII. c. 28, was repealed.

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It is upon the revival of these Acts, or such parts of them as define and enumerate the "prohibited degrees," that the law respecting them at the present day stands: so far, at least, as regards their recognition by statute law.

By the 1 Eliz. c. 1, s. 2, it is enacted, "that the 1 & 2 Phil. & M. c. 8, and all and every branches, clauses, and articles therein contained (other than such branches, clauses, and sentences as hereafter shall be excepted) shall be repealed, and thenceforth utterly void and of none effect." The Act then proceeds to revive most of the statutes repealed by 1 & 2 Phil. & M. c. 8, omitting the statute 25 Hen. VIII. c. 7, but terminating with the 28 Hen. VIII. c. 16, which is expressly revived by sec. 10, which section concludes in the following words, "and all and every branches, words, and sentences in the said several Acts and statutes contained are *revived, and shall stand and be in full force and strength to all intents, constructions, and purposes."

[*358, n.]

By sec. 12 the 32 Hen. VIII. c. 28, is revived, and the 13th section provides "that all other laws and statutes, and the branches and clauses of any Act or statute repealed and made void by this first Act of repeal of 1 & 2 Phil. & M. c. 8, and not in the present Act specially mentioned and revived, shall stand, remain, and be repealed and void, in such like manner and form as they were before the making of this present Act."

The reason for the omission of the 28 Hen. VIII. c. 7, from this Act, or at least so much of it as applied to the succession, is obvious; but the revival of the subsequent Act, 28 Hen. VIII. c. 16, in which (sec. 2,) the "prohibited degrees" were expressly referred to the former Act, has induced the conclusion, that notwithstanding the words of the 13th section, the "prohibited degrees," as contained in the 28 Hen. VIII. c. 7, are within the intent, construction, and purpose of 28 Hen. VIII. c. 16, and consequently that 28 Hen. VIII. c. 7, is to that extent revived (1).

It must be observed, however, that the 32 Hen. VIII. c. 28, is without doubt in force, having been fully revived by 1 Eliz., and that the "prohibited degrees" are there declared to be the Levitical degrees, a table of which, compiled from the previous statutes of 25 and 28 Hen. VIII., Lord Coke sets forth in his comments on that statute (2).

In the year 1603, the year following the settlement of the Thirty-nine Articles, the table of the "prohibited degrees" which is usually prefixed to the Bible and Book of Common Prayer was drawn up by Archbishop Parker,

(1) *Harrison v. Burwell*, Vaughan, (2) Co. 2 Inst. 683. See also 1 325: 2 Ventris, p. 11; *Hill v. Good*, Inst. 235. Vaug. 302; 3 Keble, 166.

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by whose name it is known, and was published by the authority of the Queen; it is intituled, "A Table of Kindred and Affinity, wherein whosoever are related are forbidden in Scripture and our Laws to marry together."

[*359, n.]

By the 99th canon of 1603 it is provided that "no persons shall marry within the degrees prohibited by the laws of God, and expressed in a table set forth by authority, A.D. 1563; and all marriages so made and contracted shall be adjudged incestuous and unlawful, and consequently shall be dissolved as void from the *beginning; and the parties so married shall be by course of law separated; and the aforesaid table shall be in every church publicly set up and fixed at the charge of the parish."

This canon was extended to the province of York the year following, and to Ireland A.D. 1634 (1).

In suits for nullity of marriage by reason of incest, this canon is pleaded in the Ecclesiastical Courts; but the authority of the canons of 1603 to bind laymen has been doubted, even in the Spiritual Courts (2); and Lord HARDWICKE, in an elaborate judgment in the King's Bench, declared the opinion of the Judges to be, that the canons of 1603, not having been confirmed by Parliament, did not *proprio vigore* bind the laity (3). It has been said also, by very high authority in the Ecclesiastical Court, that the canons are in many instances only declaratory of the law, as to what shall be its execution, and not always introductory of the offence (4).

It would seem, therefore, that unless the statute 28 Hen. VIII. c. 7, is kept in force by the revival of 28 Hen. VIII. c. 16, there is at this time no statutory definition of what are the "prohibited degrees."

As to the continuance of the suit for nullity of marriage by reason of incest, since the statute 4 & 5 Will. IV. c. 54, see *Elliott v. Gurr* (5); or the proceeding by suit of jactitation, see *Hawke v. Corri* (6).

(1) Gibson Cod. 414; Consilia Mag. Brit. 4 vol. 244—245.

Crompton v. Butler, 1 Hagg. Cons. Rep. 464.

(2) *Lloyd v. Owen*, 1 Lee R. 437.

(5) 2 Phil. Rep. 19, 20.

(3) *Middleton v. Crofts*, 2 Atk. 650.

(6) 2 Hagg. Cons. Rep. 284.

(4) Per Sir WILLIAM WYNNE, in

CHANCERY.

STICKNEY *v.* SEWELL.

(1 My. & Cr. 8—16.)

Two executors were empowered by will to lend money on Government real or personal security. One of them, in 1815, lent part of the fund to his co-executor and his partner in trade, upon mortgage. The mortgagors became bankrupt in 1831, and then the mortgaged property, which consisted, in part, of a windmill, a watermill, and a house in a town, being sold, produced considerably less than the sum advanced. The executors were held liable for the deficiency.

Although two-thirds of the value may be advanced by trustees upon a mortgage of property of a permanent value, as freehold land, yet they ought not to advance so much upon houses or buildings; still less upon buildings used in a trade (1).

RICHARD ALLEN, by his will, dated the 8th of September, 1811, directed his executors, William Sewell and John Woollsey, to place out at interest the monies to arise from the sale of certain real estates, and from the conversion of his personal estate, after payment of his funeral and testamentary expenses, specific legacies, and debts; and he authorised and empowered, ordered and directed, his said executors, in their names to put, place, and continue out at interest on Government real or personal security, one third part of the said monies during the joint lives of his son Richard and Mary his wife, and the life of the longest liver of them, and to pay the dividends, interest, and annual produce to his said son Richard for his life, and after his decease, to the said Mary his wife for her life; and after the death of the survivor of them, the testator *gave the principal money, directed to be placed out at interest during their lives, unto all their children who should be then living.

The will contained similar provisions with respect to the other two thirds, in favour of his daughter Margaret Marsham, the wife of William Stickney, the plaintiff, and her husband and

(1) The rule here laid down was recognised in later cases: see *Olive v. Westerman* (1886) 34 Ch. D. p. 72; and a margin of one-half was usually considered necessary and sufficient in a trust mortgage of freehold houses. Trustees are now personally

protected against loss by depreciation of a mortgage in any case where the mortgage was originally a proper investment with a margin of one-third of the value of the security: see Trustee Act, 1893, ss. 8 and 9. —O. A. S.

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Nov. 16, 17, 19.

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PEPYS, M.R.

[8]

[*9]

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children, and his daughter Mary, the wife of James Marston, and her husband and children.

The testator declared it to be his mind and will, that his said executors should not be answerable or anywise accountable for any loss which might happen of any of the monies thereinbefore directed to be placed out at interest as aforesaid, so as such loss happened without their wilful default; but such loss should be borne by the person or persons respectively entitled to such monies; nor should they be answerable or accountable for any more of his monies or estate than should come into their hands, nor for the acts, receipts, or payments of each other, but each of them for his own acts and payments only.

The testator died in the course of the year 1811. The real estates directed to be sold were sold by the executors accordingly.

In February, 1815, Sewell, in pursuance of the power of investment contained in the will, lent to Woollsey, his co-executor, and John Secker, who was Woollsey's partner in trade, the sum of 3,000*l.* on mortgage of certain freehold and copyhold hereditaments belonging to them respectively, situate in Swafeld, North Walsham, and Great Yarmouth, in Norfolk; the mortgage deeds bearing date the 15th of February, 1815.

[10]

On the 31st of May, 1831, a commission of bankrupt was issued against Woollsey and Secker, under which they were declared bankrupts. There was then due from them on the security of the mortgage a sum of 3,193*l.* 3*s.* Under an order in the bankruptcy, the mortgaged premises were put up for sale by public auction on the 8th of September, 1831, when such part as belonged to Woollsey was sold for 560*l.*, and such part as belonged to Secker for 1,610*l.*, amounting to 2,170*l.*; which sum, by deducting 202*l.* 3*s.* 3*d.* for the expenses of obtaining the order, and of the sales, was reduced to 1,967*l.* 16*s.* 9*d.*; and this sum being deducted from the sum of 3,193*l.* 3*s.*, left 1,225*l.* 6*s.* 3*d.* The latter sum was proved by the defendant Sewell under the commission, and he received a dividend of 1*s.* 6*d.* in the pound upon such proof, amounting to 91*l.* 17*s.* 10*d.* That part of the property included in the mortgage which had belonged to Secker having been purchased on behalf of the defendant William Sewell, in order that it might be resold to a greater advantage

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for the benefit of the testator's estate, it was afterwards sold for 1,700*l.*, being an advance of 90*l.*; which latter sum, by deducting 8*l.* 14*s.* 4*d.* as the expenses of the second sale, was reduced to 81*l.* 5*s.* 8*d.* The defendant Sewell also received for interest upon the purchase monies, and for rent of the mortgaged premises, 107*l.* 15*s.* 3*d.*; and after deducting that sum, and the sums of 91*l.* 17*s.* 10*d.* and 81*l.* 5*s.* 8*d.* (making together, 280*l.* 18*s.* 9*d.*), from the sum of 1,225*l.* 6*s.* 3*d.*, there remained the sum of 944*l.* 7*s.* 6*d.*, which was considered by Sewell as a total loss.

Secker's part of the property consisted of a dwelling-house, outbuildings, yard, and garden; and a water-mill, cottage, and granaries adjoining, and about sixteen acres of arable and meadow land; and also a wind-mill and about two roods and thirty perches of arable land *respectively situate in North Walsham and Swafeld, which are adjoining parishes. Woollsey's was a dwelling-house, with the yard, garden, and appurtenances, situate in the market-place in Great Yarmouth.

[*11]

The bill was filed in the year 1829, by Mr. and Mrs. Stickney and their children, and Mary Allen, the widow of the testator's son, and her children, against the executors and Mr. and Mrs. Marston and their children; and it prayed that an account might be taken of the personal estate of the testator, and of the produce of the real estates directed to be sold, and that the clear residue might be invested in the funds, or upon real securities, for the benefit of the persons entitled under the will.

By the order on further directions, the Master was directed to inquire whether the 3,000*l.* invested on the security of a mortgage from John Woollsey and John Secker, was advanced and properly invested pursuant to the directions contained in the will of the testator, Richard Allen, and whether any and what part of such sum of 3,000*l.* had been lost in consequence of such investment; and he was to be at liberty to state any special circumstances.

On the part of the defendant Sewell a state of facts was carried in before the Master, and affidavits were filed, to shew that the value of the property in the year 1815 was such as to afford an ample security. The affidavit of one of the witnesses, an appraiser long resident on the spot, stated Secker's part of the property to have been worth 3,500*l.* in the year 1815. In

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[*12]

the judgment of another witness, a surveyor and land agent, who had also long lived at North Walsham, the same property was, in *that year, a very ample and competent security for 2,200*l.* or 2,300*l.* Another witness, an estate agent, for many years intimately acquainted with Secker's part of the property, considered that, in the year 1815, it was, in addition to Woollsey's property at Yarmouth, which he had been informed and believed was worth 1,200*l.*, or thereabouts, an ample and competent security for 3,000*l.*; and he gave the following reasons for his opinion, viz., that the parochial rates were then very low, and nearly nominal; that the dwelling-house, granary, and stables had then been built only about thirty or thirty-five years, and were substantial; that much of the land was of excellent quality; that the rental, from 1813 to 1816, to a respectable tenant, was 250*l.* per annum; and, subsequently, 180*l.* per annum, until within the last four or five years; that there was at that time only one other wind-mill in the neighbourhood, whereas there were now (in June, 1834) three others; that it was at that time, and was still, customary to lend money on mortgage at two thirds, and in many instances at three fourths of the estimated value of the property; that it was usual to estimate the value of property of this mixed description at twenty-five years' purchase, after deducting all outgoings; and that the great depreciation in the value of mill property in the neighbourhood of North Walsham had, in the witness's opinion, taken place only within the last four or five years.

An appraiser and house and estate agent, who had resided forty years in Yarmouth, stated the value of Woollsey's part of the property to have been, in the year 1815, 1,200*l.* at the least. Two other witnesses living in the town, one a builder, the other a house agent, considered the same property as having been worth, in 1815, at least from 1,200*l.* to 1,300*l.*

[13]

Their reasons were, that Yarmouth was then in a very flourishing condition, and that property there, generally, was then worth double its present value; that the house was a corner house, with a good shop, and well situated for trade; that seven or eight years since, when a considerable depreciation in property at Yarmouth had taken place, 1,000 guineas were

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offered for it by a respectable chemist and druggist, and refused ; that the net rental in 1815 was 50*l.* per annum, which, at twenty-five years' purchase, would render the property worth 1,250*l.*

The Master reported that, upon consideration of the state of facts, and of the evidence read before him, he found that the sum of 3,000*l.*, invested on the security of the mortgage from Woollsey and Secker, was not advanced and properly invested pursuant to the directions contained in the will ; and he allowed the defendants the sum of 2,459*l.* 18*s.* 1*d.* only, part of the sum of 3,000*l.*, contained in their discharge ; and he disallowed the sum of 202*l.* 9*s.* 3*d.*, and 8*l.* 14*s.* 4*d.*, the expenses incurred in the sale of the mortgaged premises. And he found that the sum of 751*l.* 4*s.* 6*d.*, part of the 3,000*l.*, had been lost in consequence of such investment as before mentioned.

The defendant Sewell took exceptions to the Master's report.

Mr. Pemberton and *Mr. Sharpe*, in support of the exceptions, contended that a trustee should not be charged with the deficiency of a security, when that deficiency has been occasioned by the depreciation of agricultural produce, and by a diminution in the value of the property, arising from special circumstances which could not have been foreseen ; and they relied on the authority *given by the will to place out the money upon personal security.

[*14]

Mr. Bickersteth and *Mr. Roupell*, *contrâ*.

Mr. Sidebottom, for the defendants, the Marstons.

THE MASTER OF THE ROLLS (after stating the will, the loan, and the terms of the reference) :

Nov. 19.

The Master has found, that, with reference to the value of the property in 1815, there was not a sufficient investment. The reference gives him the power of making a much wider inquiry ; but he has confined himself to the question of value ; and the cause now comes on upon exceptions to the Master's report.

A question might, however, be made, whether a power to invest actually arose. The power was not to commence until the estate was clear, and all realised, and it was only intended to secure the share of the residuary legatees.

Now, it is clear from the pleadings, that this was not an

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ascertained residue. The investment of 1815 took place before the estate had been wound up.

[His Honour here stated in detail the affidavits as to the value.]

[*15]

The Master might also have taken into consideration, that the will gives the executors an authority to lend money on real or personal securities. Whether this was a proper investment, or not, was quite open to the Master to inquire. The testator intended that the *estate should have the benefit of the executors' discretion; but they lend to themselves. In the case of *Langston v. Ollivant* (1), the will had given the executors a power to lend on personal security. The loan was within the terms of the authority, but the Court thought that the authority did not extend to an accommodation, which was what had there taken place, and the executor was held liable.

These exceptions, however, are upon the question of value. The result being, that trust money to the amount of 750*l.*, besides interest, is lost, the burthen of proof of sufficient value lies upon the executors. To advance two thirds is admitted to be within the rule of ordinary prudence; but that is with reference to property of a permanent value, as freehold land. The same rule does not apply to property in houses, which fluctuates in value, and is always deteriorating.

Nearly twenty years have, in the present case, elapsed between the investment and the loss. Twenty years' wear and tear of a house necessarily lessen its value. The observation, that the rule as to lending two thirds is good only with reference to property of a permanent value, applies particularly to the house in Yarmouth, and in some degree, also, to Secker's part of the property. There were only sixteen acres of land, comprising but a small part of the value of 8,500*l.*, put upon his part of the property by the witnesses. One of the witnesses states, as a cause that raised the value, that there was only one other wind-mill there in 1815, whereas now there are three. You cannot say that that is a proper investment which derives its value from the accidental absence of competition in trade.

[16]

There is no evidence of a valuation having been made in the year 1815.

(1) 14 R. R. 213 (G. Coop. 33).

There is another view of this case, which is not strictly within the finding of the Master; namely, that the rent of Secker's property up to 1816 was 250*l.*, and afterwards 180*l.*; so that one year after the investment the annual value fell so much as 70*l.* Suppose this investment had not been made for the executor's own benefit, and this fall had come to their knowledge; would they have permitted the money to remain on an investment which had fallen so much in value in one year? The utmost value the defendant's witnesses put upon this part of the property in 1815 was 3,500*l.*; and they say that property of that description is estimated at twenty-five years' purchase. Now, 250*l.* at twenty-five years' purchase would be 6,250*l.*, and even at 180*l.* it would be 4,500*l.* This shews, therefore, that there is a great want of accuracy in the statements of these witnesses as to value. So, if the rent of the house was only 50*l.* in 1815, it is impossible that the house could have been worth 1,200*l.*

The result of the whole case is, that there are many grounds, upon every one of which these parties would be liable, even if I did not think that the Master had come to a right conclusion as to the value; but I think that as to value the Master has come to a right conclusion. The exceptions must, therefore, be

Overruled.

STIFFE *v.* EVERITT (1).

(1 My. & Cr. 37—41; S. C. 5 L. J. (N. S.) Ch. 138.)

A husband and wife cannot effectually dispose of the wife's life estate in personal property, the *corpus* of which is not settled to her separate use, since the wife has a contingent reversionary life interest in the property which will arise in the event of her surviving her husband (2).

SIR JOHN EVERITT gave and devised all his real and personal estate, subject to the charges therein mentioned, to trustees, upon trust to convert the same into money, and pay and apply

(1) *Pigott v. Pigott* (1867) L. R. 4 Eq. 549, 37 L. J. Ch. 116, 16 L. T. 766.

(2) It is remarkable that the point mentioned in the head-note, upon which the LORD CHANCELLOR based his refusal to comply with the petition, and for which alone this

case requires notice, did not actually arise, since the separate use expressly attached during the whole life estate, and not during the coverture only. The restraint on anticipation would have been sufficient ground for refusing the petition in any case.—O. A. S.

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the proceeds in three equal shares, one to his son, and to retain the two other shares in trust for his two daughters, Charlotte Watts (then Charlotte Everitt), and Elizabeth E. Stiffe (then Elizabeth Everitt), their heirs, executors, and administrators; and the testator declared that the trustees should stand possessed of all sums of money which should under his will be payable and applicable for the benefit of his said daughters, for the sole and separate use of his said daughters respectively, in equal shares, during their respective lives, free and independent and exclusive of the debts, control, and engagements of any person or persons with whom they, or either of them, might thereafter intermarry: upon trust, nevertheless, to lay out and invest the same upon the securities therein mentioned, and to pay and apply the interest, dividends, rents, and profits thereof, from time to time, as the same should be received by the trustees, into the proper hands of his said daughters respectively in equal shares, but without any power of anticipation thereof by his said two daughters respectively; the receipts alone of each of his said two daughters from time to time, after the same interest and dividends, rents, *issues, and profits, should have become payable to them respectively, to be good and sufficient discharges notwithstanding their coverture; with a power to each of the daughters at any time, whether sole or married, by deed, or by last will and testament in writing attested as therein mentioned, to appoint to any person she might think fit, but to take effect only from and after her decease, and without prejudice to her life estate and interest therein, the whole or any part of the monies or property, constituting her third part of the testator's residuary real and personal estate as aforesaid.

[*38]

The testator died in January, 1823, and was survived by his son and daughters, of whom Charlotte afterwards, in January, 1824, intermarried with George Watts, without any settlement being made on her marriage; and Elizabeth, in October, 1827, intermarried with the plaintiff, William Stiffe.

A suit was instituted for the purpose of administering the trusts of the will; and the sums invested and appropriated by the trustees to answer the shares of the two daughters having been found by the Master's report, a petition was now presented by Mr. and Mrs. Watts. * * *

The prayer of the petition was, that the fund representing the one third share of Charlotte Watts, should be transferred to the petitioner her husband absolutely.

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A similar petition was presented by Mr. and Mrs. Stiffe, and was heard at the same time.

Mr. Bickersteth and *Mr. K. Parker*, in support of the petition of Mr. and Mrs. Watts:

By the terms of the will Mrs. Watts *took the property for her life; as she also took an absolute power of disposition over it by deed or will, subject to her own previous life estate, her life estate, coupled with the power, gave her, in effect, the whole interest in the property. * * *

[*40]

Mr. Girdlestone, jun., in support of the second petition. * * *

Mr. Elderton and *Mr. Stalman*, for the trustees. * * *

Mr. Girdlestone, sen., for other parties.

[The cases cited by counsel have no bearing upon the point stated in the head-note.]

The MASTER OF THE ROLLS said that the doubt he felt was one which the authorities cited left quite untouched, namely, how far, where an annuity or life interest in a fund was given to a married woman and not settled to her separate use, the husband with her concurrence was capable of effectually disposing of her entire life estate, seeing that she might outlive her husband, and then, as to such part of it as would be enjoyed by her after the coverture determined, her interest would be reversionary only. He should be glad to be furnished with any cases which would relieve him from this difficulty; but unless some authority for it was produced, he must decline to make the order.

THE LORD CHANCELLOR(1) [after stating the substance of the petition]:

1836.
Jan. 23
[41]

When this petition came on to be heard, it was assumed that the only question was the authority of some late decisions with respect to property left to the separate use of a woman not married at the time; but I suggested another difficulty, namely,

(1) His Lordship heard this case judgment on it until after he became at the Rolls, but did not deliver Lord Chancellor.

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with respect to the power of the husband to dispose of his wife's life interest when not settled to her separate use; and the petition stood over for the purpose of enabling the petitioners' counsel to produce cases in favour of such right. I have since been informed that no such cases are to be found. It is, I believe, certain that there are none; and the question is, whether consistently with the doctrine established in *Purdew v. Jackson* (1), and *Honner v. Morton* (2), any such power can exist. This very point is just alluded to in a note to *Purdew v. Jackson* (3), but there is no decision upon it. I do not see how, consistently with the cases of *Purdew v. Jackson* and *Honner v. Morton*, the husband can make a title to such of the dividends of the fund as may accrue after his own death and during the life of his wife surviving him.

In the absence, therefore, of any authority, and without any argument in support of the claim, I cannot make the order prayed. If the case should come formally before me to be argued, I shall give it every attention; but as the matter now stands the order must be refused.

1835,
Dec. 14.

*Lords Com-
missioners.*
PEPYS and
BOSANQUET.

LOGAN v. FAIRLIE.

(1 My. & Cr. 59—68.)

[A NOTE of this appeal, reversing the VICE-CHANCELLOR's decision (reported in 25 R. R. 208), will be found with the report below. The case of *A.-G. v. Forbes*, 37 R. R. 12 (2 Cl. & Fin. 48), also reported under the title of *A.-G. v. Jackson* in 8 Bligh (N. S.) 15, makes any further report of this appeal unnecessary.—O. A. S.]

1835,
Nov. 17, 19, 20.

Rolls Court.
PEPYS, M.R.

[80]

BUXTON v. BUXTON (4).

(1 My. & Cr. 80—96.)

An executor, who allowed part of a testator's assets to remain invested in Mexican bonds for a year and seven months after the testator's death, and eventually sold the bonds at a lower price than might have been obtained by a sale at an earlier period, but who appeared to have acted

(1) 25 R. R. 1 (1 Russ. 1).

(2) 27 R. R. 15 (3 Russ. 65).

(3) 1 Russ. 71, *n.* (not retained in the Revised Reports). See also Com. Dig. Baron and Feme, K. "If the wife has an annuity for life a release

by the husband does not bind his wife if she survives. R. Mo. 522."

(4) In *Marsden v. Kent* (1877) 5 Ch. Div. 598, 46 L. J. Ch. 497, 37 L. T. 49, the Court of Appeal approved of and followed this case.—O. A. S.

throughout with diligence and good faith, was held, under the circumstances, not to be liable for the loss consequent on his not having sold them sooner.

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A difference of opinion between two executors, as to the propriety of converting the assets at a particular period, followed by a demand made by one of them upon the other to concur in effecting an immediate conversion, does not deprive the latter of the right to exercise his own discretion, or render him liable for the loss that may arise from the delay consequent on his declining to comply with the demand.

By the decree in this suit, which was instituted for the purpose of having the estate of the testator, Benjamin Buxton, administered according to the trusts declared in his will, it was among other things directed that the Master should inquire and state when the Mexican bonds in the pleadings mentioned were sold, and whether, in a provident administration of the estate of the testator, they ought to have been sooner sold; and whether any and what loss was sustained by the testator's estate, by the bonds not having been sooner sold; and the Master was to be at liberty to state any special circumstances relating to the said bonds as he might think fit.

Benjamin Buxton, by his will, dated the 11th of January, 1825, after giving divers pecuniary legacies to his relations therein mentioned, and among others a legacy of 5,000*l.* to his brother the defendant, John Buxton, devised and bequeathed a freehold messuage in Liverpool, and also all his household goods, fixtures, furniture, &c. therein, to his sister-in-law Alice Buxton for her life, and after her decease unto the said John Buxton and John Fearon, and the survivors, &c. their heirs, executors, administrators and assigns, upon trust, with all convenient speed after her decease, to realise the household furniture and other things of a personal nature, and also to sell and dispose of the freehold messuage, and to hold the produce of such real and personal estate upon the trusts declared of his residuary property. And the testator gave, devised, and bequeathed unto the said John Buxton, John Fearon, and Alice Buxton, (whom he appointed the executors and executrix of his will), and the survivors &c., all his real and personal estate not before specifically devised or bequeathed upon trust, with all convenient speed after his decease to call in and convert into money such part of his personalty as should

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not consist of money, and also to sell and dispose of his freehold and leasehold estates in such manner and at such prices as to his said trustees should seem reasonable; and, subject to the payment of his debts and funeral and testamentary expenses and legacies, to hold the proceeds upon trust, to raise two several sums of 10,000*l.* and 5,000*l.*, and to invest the same in the public funds, or on real security, and to pay the interest and dividends to the several parties, and according to the several trusts therein mentioned. The testator then gave the residue of his personal estate to be distributed among certain charities which he specified; and directed that all his said legacies should be paid within four calendar months after his decease; *and he further authorised his executors to pay any debts owing by him or claimed from him upon any evidence they should think proper. Lastly, he declared that his said trustees should be charged and chargeable respectively only for such monies as they should respectively actually receive by virtue of the trusts in them reposed, notwithstanding their giving or signing, or joining in giving or signing, any receipt or receipts for the sake of conformity; and that any one or more of them should not be answerable or accountable for the other or others of them, or for the acts, receipts, neglects, or defaults respectively of the other or others of them, but each of them only for his or her own acts, receipts, neglects, or defaults respectively; and that they should not be answerable or accountable for any banker, goldsmith, broker or other person with whom, or in whose hands or custody, any part of the said trust monies should or might be deposited or lodged for safe custody, or otherwise in the execution of the trusts; and that they should not be answerable or accountable for the insufficiency or deficiency of any securities, stocks, or funds in or upon which the said trust monies, or any part thereof, should be placed out or invested, or any other misfortune, loss, or damage which might happen in the execution of the trusts, or in relation thereto, except the same should happen by or through their own wilful default respectively.

The testator died on the 21st of March, 1826, and his will was proved by John Buxton and Alice Buxton on the 5th of May, 1826, and by John Fearon, the other executor, in the month of July, 1827.

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The affidavit of D. F. Atkinson, made in support of the state of facts carried in before the Master on behalf *of the plaintiffs, among other things stated that he had been the solicitor and confidential adviser of the testator, and subsequently of the executrix Alice Buxton, by whom he had been consulted and employed in the management of the testator's affairs after his decease: That the testator was at the time of his death possessed of 20,450*l.* 5 per cent., and also of 200*l.* 6 per cent. Mexican bonds: That in the month of June, 1826, he, Atkinson, on behalf of Alice Buxton, repeatedly wrote to John Buxton, pressing him to sell the bonds, and to join with her in authorising such sale; and that he received from John Buxton in reply a letter, dated the 25th June, 1826, to the following effect: "I have this moment received your two letters, and am sorry that the Mexican bonds keep getting of so much less value; but had you been authorised to sell when you wrote, they would not have been sold before last Friday, which would have been so bad a price as I should be sorry to take. It astonishes me to think who would be so foolish as to purchase if there was a great likelihood to lower, according to your account, as I should think those who want to purchase should know too well to buy. However, my mind is not to sell just at this bad market:" That afterwards on the 9th August, 1826, he wrote and sent by post another letter to John Buxton, as follows: "Mrs. Buxton requests me to inform you that she has been applied to by one of the legatees for the payment of his legacy, and that unless you make up your mind to act reasonably in the administration of the deceased's effects she will throw the whole concern into Chancery, and hold you personally responsible for the great loss occasioned by your refusing to sell out the Mexican bonds when they were at 63*l.* per cent.:" That in consequence of John Buxton's refusal to concur in the sale of the bonds, a formal notice was afterwards *served upon him at the instance of Alice Buxton, to the effect that Messrs. Cocks & Co. bankers, Charing Cross, with whom the Mexican bonds were then deposited, refused to give them up unless he, John Buxton, joined her in a receipt, which she thereby required him to do, in order that the bonds might be got possession of and sold, and the

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proceeds applied as directed by the will; and that unless he consented, within one month from the date thereof, to join her in duly and regularly executing the trusts of the will, and in administering the estate according to the terms of the said will, a bill in equity would be filed against him, and that he would be held liable for all losses and damages already sustained in consequence of his retarding and obstructing the due administration of the said deceased's effects, and the execution of the trusts of the will. This notice was dated the 22nd September, 1826, and was served on John Buxton on the 4th of October following.

It appeared from the counter-state of facts carried in on behalf of John Buxton, and the affidavit made in support of it, that the testator purchased the 5 per cent. Mexican bonds on different days in the month of January, 1825, and at prices varying between 80*l.* and 82*l.*: That on the 21st July, 1826, when the four calendar months, at the end of which the legacies were directed to be paid, expired, the market price of 5 per cent. Mexican bonds was only 40*l.* per cent., being 2½ per cent. lower than the lowest price at which the bonds in question were afterwards actually sold: That the price of 5 per cent. Mexican bonds on the 30th day of June, 1826, was 42*l.* per cent., and that during the month of July, 1826, the price of such bonds was never higher than 42*l.* per cent., and was at one period as low as 31*l.* per cent.: That on the *11th August, 1826, when Atkinson's letter of the 9th of August came to John Buxton's hands, the price of Mexican bonds was lower than was subsequently obtained on the sale; and that with respect to the demand contained in the notice of the 22nd September, the same had been waived by Alice Buxton, who had frequently in the months of November and December, 1826, stated, that as the executors were receiving much larger interest for the Mexican bonds than could be got in any other way, they would not sell them until after all the testator's houses had been disposed of; and that Alice Buxton at that time said in conversation that she had frequently asked John Buxton to join in the sale of the bonds merely to hear what he would say, although she had herself no intention of selling them till the sales of the houses were all completed.

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The Master's report, after setting forth the testator's will, and the state of facts laid before him on behalf of the plaintiffs and of the defendant John Buxton respectively, together with the affidavits by which they were supported, found that the testator at the time of his death, on the 21st of March, 1826, was possessed of 20,450*l.* Mexican bonds bearing interest at 5*l.* per cent. per annum, and of 200*l.* of the like bonds bearing interest at 6*l.* per cent. per annum: that on the 21st June, 1827, 5,000*l.* of the 5 per cent. bonds were sold, 2,000*l.* thereof at 57*l.* 10*s.* per cent., and 3,000*l.* thereof at 57*l.* per cent.: that on the 29th October, 1827, the 200*l.* 6 per cent. bonds were sold at 54*l.* 10*s.* per cent., as also 8,450*l.* of the 5 per cent. bonds at 42*l.* 10*s.* per cent.: that on the following day 1,000*l.* more of the 5 per cent. bonds were sold at 42*l.* 15*s.* per cent., and 6,000*l.*, being the remainder of the said bonds, were sold at 42*l.* 10*s.* per cent.; and upon consideration of the *said several states of facts and evidence adduced in support thereof respectively, he was of opinion that the defendant John Buxton took an unnecessary and unreasonable time to dispose of the bonds in question, and that he ought not to have speculated on the rise and fall of those securities; and he was, therefore, further of opinion that under a provident administration of the estate the said bonds should have been sold sooner, and that a loss had been sustained by the said testator's estate. And he also found that the said bonds ought to have been sold in the month of October, 1826, when the mean market price of the 5 per cent. bonds was 55*l.* per cent., and of the 6 per cent. bonds, 64*l.* per cent. But upon the sum of 2,000*l.* sold in June, 1827, at 57*l.* 10*s.* per cent., and the sum of 3,000*l.* sold at the same time at 57*l.* per cent. he found that there had been no loss, but a gain; and with respect to the remainder of the 5 per cent. bonds sold in October, 1827, at 42*l.* 10*s.* and 42*l.* 15*s.* per cent., and the said 6 per cent. bonds sold at the same time at 54*l.* 10*s.* per cent., he found there had been a loss, namely, the difference between those prices and the respective sums of 55*l.* per cent. and 64*l.* per cent., for which John Buxton ought to be liable, being the cause, by his refusal, why the bonds were not sold in October, 1826; and he found that such loss to the testator's estate amounted to the sum of 1,947*l.* 15*s.*

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To this report the defendant John Buxton took a number of exceptions, all of which were in substance reducible to two; first, That the Master had come to a wrong conclusion in finding that the exceptant ought to be held liable for the loss occasioned by the Mexican bonds not having been sold at an earlier period; and, secondly, That he had proceeded on erroneous principles in calculating the amount of the loss.

[87] *Mr. Pemberton and Mr. John Wilson, for the exceptions :*

* * It is clear that [Mr. Buxton] acted *bonâ fide* throughout, and with an honest intention to benefit his testator's estate, and that he was always anxiously looking out for a favourable opportunity of converting the bonds into money. * * If he had sold, as he certainly would have been fully justified in doing, at the end of four months from the testator's decease, the bonds would have produced no more than 40*l.* for every 100*l.*, instead of producing 54*l.* and 57*l.*, *the prices obtained upon the respective sales which were subsequently made.

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[89] * * The only other time which can be suggested as proper, was at the end of a year from the death of the testator. The plaintiffs, however, have not thought fit to fix upon that period; and the inference is, that a sale at the end of a year would have been attended with a greater loss than the one of which they complain. Such a period, therefore, would not have answered their purpose. It is to be observed, moreover, that the clauses in the will vesting a discretion in the executors, and relieving them from responsibility for losses, are unusually large and comprehensive.

Mr. Bickersteth and Mr. Walker, contra :

It has long been settled, that the indemnity clause, however general in its terms, has no greater effect in limiting an executor's responsibility than a court of equity will imply in the absence of such a clause. * * Mr. Buxton did not, as it was his duty to have done, realise the bonds within a year after the testator's death; although during that period more than one opportunity occurred at which he might have sold them for a higher price than was eventually obtained. He chose to hold them for *seven months longer, and to speculate upon a possible

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rise of price. As his proceedings in that respect were a clear breach of trust, though, perhaps, not originating in any bad motives, the plaintiffs had, in strictness, a right to charge him with the difference between the highest sum which might have been got at any time in the course of the year, and the sum which was afterwards actually realised. A trustee who speculates with his trust money always does so at his own peril. The profit, if any, belongs to the cestui que trust; the whole loss must be borne exclusively by the trustee himself,—simply on the principle that such conduct is a wilful and dangerous violation of duty, and ought, by every means, to be discountenanced and punished. * * *Dimes v. Scott* (1). * * *

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Mr. Pemberton, in reply.

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THE MASTER OF THE ROLLS :

Nov. 20.

The Mexican bonds, as to which the present question arises, were sold partly on the 21st of June, 1827, at prices varying from 57*l.* to 57*l.* 10*s.*, partly on the 29th of October at 42*l.* 10*s.*, and the remaining part on the 30th of the same month at 42*l.* 10*s.* and 42*l.* 15*s.* There was also a small sum of 6 per cent. stock, which was sold on the 29th of October at 54*l.* 10*s.*

In support of the claim of the legatees it was argued that the executor ought to be charged as the Master has charged him, because there has not been a prudent administration of the estate with respect to these bonds, and that the bonds ought to have been sold sooner. The Master has certainly fixed upon a very extraordinary time as the one at which the sale ought to have taken place, and one for which no good reason seems assignable; for he has held that the sale ought to have been made in the month of October, 1826, on the ground that an application was made by Alice Buxton early in that month, calling upon her co-executor to sell.

Before I inquire how far the Master was right in fixing upon the period he has adopted, the question arises, whether, independently of any such application, it was so far the duty of John Buxton to sell at any antecedent period as to make him liable

(1) 28 R. R. 46 (4 Russ. 195).

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for the loss consequent on the delay. Except the provision for the payment of the legacies within four months, there *is nothing peculiar in the will. A direction to convert with all convenient speed is no more than the ordinary duty implied in the office of an executor, and there must necessarily be some discretion. If a reasonable discretion were to be denied to an executor, if it were to be laid down as an inflexible rule that he ought to convert the assets without waiting or considering how far it was for the interest of those who are beneficially entitled, there would of necessity be always an immediate sale; the executor would be bound to sell at whatever loss. Such a rule would be in its operation most injurious, and it has never been acted upon by the Court, which in cases of this kind has always considered what is for the interest of all parties concerned.

The real question for the consideration of the Court is, whether a reasonable discretion has been here exercised by the executor. I cannot think that it was his duty to come to an immediate sale of these bonds, any more than of any other description of property. Looking to the correspondence, it is impossible to impute any thing to the executor but an anxious desire to increase an estate in which, undoubtedly, he had himself a large personal interest. The testator had bought these bonds at a very high price, and a considerable depreciation had taken place in their value prior to the time of his death. It is to be observed also, that at the end of the four months, when the legacies were directed to be paid, the bonds were lower than the prices which they afterwards realised; and if they had been then sold, it could only have been on the ground that it was a convenient time to convert them. On the 21st of July, at the expiration of the four months, the bonds were only at 40*l.*, and early in that month they had been sold as low as 31*l.*, a depression from which, towards the middle of the month, they began *gradually to recover. Now there were no circumstances at that time to render a sale of them a matter of pressing moment. On the contrary, indeed, if they had been sold, nothing could have been done with the proceeds; nor did the parties interested require a sale. The application by Alice Buxton was made in the following October, the leasehold

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estates not being at that time adequate to the payment of the legacies. The executor, however, still entertained an opinion that it was not advisable to sell; and if he did exercise that discretion, as it was within his authority to do, there was no immediate purpose to which the produce could be applied.

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Thus matters went on until the time arrived when there was a pressing necessity for realising the whole of the assets, and then the bonds were sold at a price higher than they would have brought in July, though not so high as they would have produced in October, 1826. This, then, was the state of circumstances; there was property to be converted for a legitimate purpose, which purpose could not be carried into effect at the particular time, although if the conversion had taken place at that time, a large profit would have been derived from the transaction. No authority has been produced in which, under such circumstances, the personal representatives of a testator have been held liable for the loss occasioned by their not selling at the earlier period. In *Lowson v. Copeland* (1) an executor was held liable for a bond debt which had been allowed to remain due for several years after the testator's death, the report stating that only one application had been made to the obligor for payment, and that no further steps had been taken against him. These, *too, are in a certain sense bond debts, but they could only be realised by a sale of the securities. In its circumstances, therefore, that case was totally dissimilar to the present. The same observation applies to *Powell v. Evans* (2), which was also the case of a bond debt: there three years had elapsed from the death of the testator, and besides the lapse of time, the executor had never, during that period, made any inquiry as to the circumstances or solvency of the obligor. Then comes the case of *Tebbs v. Carpenter* (3), which, as reported, is a very strong decision; but whatever may be the merits of that case, it was a neglect sought to be charged on the executors for the loss of arrears of rent due for several years, and from a great

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(1) 2 Br. C. C. 156.

of trust.

(2) 5 Ves. 839; an obvious breach

(3) 16 R. R. 224 (1 Madd. 290).

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variety of tenants. In the two cases first adverted to there was not only considerable delay, far exceeding that which occurred in the present case, but also several additional circumstances implying or amounting to *crassa negligentia* on the part of the executors, and shewing that they took no care or trouble, and did not attempt to exercise any judgment as to the time when the money should be called in.

In the present case nothing of that kind can be imputed. On the part of the executor there was a vigilant attention throughout; he exercised his best discretion, and if he has erred, it was an error in the judgment he formed with respect to the propriety of leaving the property in that state of investment in which he received it from the testator. If, therefore, he was entitled to exercise a discretion, and the proof is that he did so, although he came to an unfortunate conclusion, the question is, whether he is to be charged with the loss. I can find no case, and none has been *produced in which an executor has been called upon to bear the loss that has arisen, because, in the *bonâ fide* exercise of a reasonable discretion, the conclusion he came to has turned out unfortunately.

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If, then, an executor be in general entitled to exercise such a discretion, the next question is, how far that discretion was limited in the present instance by the application made to Buxton by his co-executrix; in other words, did that application render it his imperative duty to sell? If that were so, the effect would be to vest the whole discretion in Alice Buxton, and totally to deprive John Buxton of any. If a discretion rests with one of two executors, it must surely follow that the discretion cannot be taken away by the other coming to a different conclusion. One is not bound to agree with the other: in case of a diversity of opinion they can only resort to some higher authority which is competent to control them both. The Master's view, however, was different; although certainly one would have supposed that the time which there was most reason to consider as the proper time was the month of July, soon after the time when the first application was made to the executor, rather than the following October. I cannot, therefore, think that if Buxton was entitled to exercise a discretion in the matter,

he was bound to surrender his own judgment because one of his co-executors entertained a different opinion from himself.

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For these reasons I am of opinion that the Master has come to an erroneous conclusion, and that John Buxton, in delaying to dispose of these Mexican bonds, did no more than exercise a discretion which he was justified in exercising.

Exceptions allowed.

WATKINS v. BRENT (1).

(7 Simons, 512—518; affirmed 1 My. & Cr. 97—105; S. C. 5 L. J. (N. S.) Ch. 49.)

The institution of a suit in the Ecclesiastical Court, for the purpose of recalling probate, is not a ground upon which alone this Court will interfere to restrain the executor from receiving the assets.

Where, however, the executor had agreed, through his proctor, that the validity of the testamentary paper by which he was appointed, should be tried in the suit to recall probate, an order was made for an injunction and a receiver, and that order was affirmed on appeal.

TIMOTHY BRENT, Esq., died in February, 1833, leaving three testamentary papers, by one of which he had appointed his wife, Margaret Brent, and William Brent Brent, Esq., his executrix and executor.

In June, 1833, probate of these papers was granted to Margaret Brent by the Prerogative Court of Canterbury, power being reserved to William Brent Brent to come in and prove them.

In January, 1835, the plaintiffs in this cause, who represented the next of kin of Timothy Brent, instituted proceedings in the Prerogative Court for the purpose of recalling the probate, and setting aside the papers, as not being testamentary. A decree of the Prerogative Court was made, calling upon Margaret Brent to shew cause why she should not bring in the probate and prove the alleged testamentary papers in solemn form, or to shew cause why the papers should not be pronounced to be invalid, and the probate thereof revoked.

In June, 1835, while these proceedings were pending, Margaret Brent died intestate. A *caveat* against the grant of probate of the papers in question to William Brent Brent was immediately

(1) *Newton v. Ricketts* (1847) 10 (1850) 2 Mac. & G. 52; *Parkin v. Beav.* 525; *Whitworth v. Whyddon Seddons* (1873) L. R. 16 Eq. 34.

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entered by the proctor for the plaintiffs. The *caveat* was warned by the proctor for Margaret Brent, who also applied for probate on behalf of William Brent Brent, as the surviving executor.

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The proctor for the plaintiffs was then authorised by them to institute a suit against William Brent Brent for *the purpose of setting aside the testamentary papers, similar to that which had been commenced against Margaret Brent. No probate was granted to William Brent Brent.

It was agreed between the respective proctors that the suit for probate on behalf of W. B. Brent should be dismissed, and that an appearance in the original suit should be entered on behalf of W. B. Brent, in the place and stead of Margaret Brent, and that that suit should be revived, which was done accordingly.

The bill prayed, amongst other things, that an injunction might issue to restrain William Brent Brent from selling or transferring the monies in the funds which belonged to Timothy Brent, and that a receiver might be appointed of Timothy Brent's personal estate.

Upon motions made before the Vice-Chancellor, upon affidavits before answer, his Honour made two orders, one for an injunction, the other for a receiver (1). The defendant, William Brent Brent, now moved to discharge the VICE-CHANCELLOR's orders.

Mr. Wigram, Mr. Richards, and Mr. Stevens, for the motions:

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* * The probate granted to Margaret Brent enured to W. Brent Brent, the other executor: *Brookes v. Stroud* (2); if that were not so, the proceedings instituted against W. Brent

[7 Sim. 518]

(1) Upon the latter motion the VICE-CHANCELLOR observed, "When I see that there was a weak case for granting probate originally, and that a suit has been commenced, in the Ecclesiastical Court, in which the circumstances under which that probate was obtained, are, *bonâ fide*, in dispute, I think that there is a sufficient ground for the interference of this Court; it being a general principle that, notwithstanding there may be a probate (as in *Andrews v. Powys*, 2 Br. P. C. 504, Toml. ed.),

or letters of administration (as in *Ball v. Oliver*, 2 V. & B. 96), in existence, if a sufficient case is made for disputing their validity, and a suit has been commenced in the Ecclesiastical Court for that purpose, this Court will interfere to protect the property, by granting an injunction and receiver pending the litigation in the Ecclesiastical Court. The consequence is that, in this case, the injunction must be continued, and the receiver must be granted."

(2) 1 Salk. 3; 7 Mod. 39.

Brent for the purpose of recalling probate would have been unnecessary. In a certain sense, it is undoubtedly true that this Court does not in practice take notice of an executor who has not proved; it is not necessary to make him a party to a suit; but it would not be improper so to do. The plaintiffs have no right to a receiver, unless they can shew that W. Brent Brent is an improper person to receive the assets; as, for instance, by reason of insolvency, or that there is danger of the property being lost, or that the will was improperly obtained from the testator, as in *Rutherford v. Douglas*.

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Mr. Kindersley and Mr. Bligh, contra. * * *

Mr. Wigram, in reply. * * *

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[The material cases cited by counsel are referred to in the following judgment.]

LORD COMMISSIONER PEPPYS, after stating the circumstances, proceeded as follows:

Nov. 23.

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* * It was stated at the Bar that his Honour the VICE-CHANCELLOR had proceeded upon the ground of there being a suit to recall probate. I think his Honour must have been misapprehended. If probate has been granted, but there is a suit to recall probate, I think that that circumstance does not give this Court jurisdiction; because there is an adjudication already. It would be different if there were fraud. If this Court were to interfere, merely because there was a suit to recall probate, it is quite evident that in order to obtain a receiver it would only be necessary to institute a suit in the Ecclesiastical Court. *This Court looks into the case to see whether, upon the whole, such a case is made as justifies this Court's interference. The strongest case is *Andrews v. Powys* (1). That, however, was an extremely strong case, and there was ground there to support the application for a receiver, independently of the proceedings in the Ecclesiastical Court. The Ecclesiastical Court had there itself so far interfered, as to order the probate to be brought into Court, in order to prevent the

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party in whose possession it was from using it. The causes of interfering there were insolvency and a *devastavit* proved to a great extent. In *Knight v. Duplessis* (1), Lord HARDWICKE put the jurisdiction on the same ground, not on the ground that there was a suit to recall probate. His Lordship said, speaking of *Andrews v. Powys*, that there was there "a will on extraordinary circumstances, and a probate got, after which they could not appoint an administrator *pendente lite* ; so that there was no other method for the next of kin against a will obtained by fraud."

[The LORD COMMISSIONER here referred to other cases where special circumstances justified the interference of the Court, and continued as follows :]

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In the present case, there is no ground for interference on account of the improper conduct of the parties ; but we have the agreement that the question as to the validity of the supposed testamentary papers shall be tried in the suit to recall probate.

That being the arrangement between the parties, is not that a proceeding which justifies the Court in interfering? Has not William Brent Brent treated himself as not being complete executor? I consider that there was a sufficient case for the VICE-CHANCELLOR'S appointing a receiver on the ground that William Brent Brent had recognised such a proceeding.

There is a very singular *Anonymous* case which was quoted by Mr. Wigram, and which is to be found in Viner's Abridgment, in Freeman, and also in 1 Chancery Cases, 265. It cannot be found in the Registrar's book. If we had all the circumstances of the case, it might be a better guide to a determination ; but, as it is stated in one of the books, it was a case of a testator who appointed one person to be executor for ten years, and another person to be executor afterwards. The person appointed for ten years proved the will ; and the question was, after the expiration of the ten years, whether the person whose executorship was then to commence, had authority, without proving the will ? It cannot be said to be reported in Viner, for the statement of it there is a mere abstract from Freeman. There is a singular mistake in it,

(1) 1 Ves. Sen. 324.

as it appears in Viner, which will be found on referring to Freeman. It is stated in Viner, that after the expiration of ten years the executor if he *pleaded* might administer without any further probate; not a very intelligible sentence; but in the report in Freeman it is, “and if he *pleased*, he might administer without any further probate.” It is unnecessary to pursue *this subject, because I think there was in this case a sufficient *lis pendens* in the Ecclesiastical Court to justify this Court in appointing a receiver.

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v.
BRENT.

[*105]

I think this is not a case in which the party failing ought to pay the costs of the appeal.

Lord Commissioner BOSANQUET concurred.

BETHUNE v. KENNEDY (1).

(1 My. & Cr. 114—118.)

A testatrix, after making two specific bequests of sums in the Long Annuities, gave the residue of her property, all she did or might possess in the funds, copy or leasehold estates, to her sisters during their lives; and at the decease of both, to be divided equally between her cousins. The testatrix's estate, after satisfying the specific bequests, consisted in part of 150*l.* per annum in the Long Annuities: Held, that the sisters were entitled to receive the dividends accruing on the Long Annuities as a specific legacy.

1835.
Dec. 22, 23.

Rolls Court.
PEPYS, M.R.

[114]

THE will of Charlotte Peyton was as follows: “I give and bequeath to my cousin, Henry Van Bodicoate, 100*l.* transfer stock in the Long Annuities; the *like sum to my god-daughter, Cumberbatch Charlotte Forth. The residue of my property, all I do or may possess in the funds, copy or leasehold estates, to my dear sisters, Martha Peyton and Hester Kennedy, widow, during their lives; at the decease of both of them, to be equally divided, share and share alike, between my cousins, namely, Henry Van Bodicoate, Mary Ann Bethune, and Miss Catherine Peyton, or

[*115]

(1) The enumeration of particular kinds of property in a residuary bequest does not make the bequest specific as to those properties: *Fairer v. Park* (1876) 3 Ch. D. 309, 45 L. J. Ch. 760, 35 L. T. 27. The rule of

Howe v. Lord Dartmouth, 6 R. R. 96 (7 Ves. 137), received less consideration here than it has received in later cases (e.g., *Macdonald v. Irvine* (1878) 8 Ch. D. 101, 47 L. J. Ch. 494, 38 L. T. 155).—O. A. S.

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their heirs, share and share alike. I nominate and appoint my sister Hester Kennedy executrix to this my last will and testament."

The testatrix died in the year 1824. After payment of the two specific legacies of Long Annuities, her residuary estate consisted, amongst other things, of 150*l.* per annum Long Annuities.

Martha Peyton survived the testatrix only a few days.

The bill was filed by two of the legatees in remainder against Hester Kennedy, the surviving tenant for life, and against other parties interested in the fund; and the sole question which it raised was, whether Hester Kennedy was entitled to enjoy the interest and dividends of the Long Annuities, as a specific legacy, or whether she took the Long Annuities only as a general residuary bequest, entitling the legatees to have the Long Annuities converted into a permanent fund, of which Hester Kennedy should have the annual income.

The case had been set down to be heard as a short cause, but it was argued at considerable length.

Mr. Tinney, Mr. Pemberton, Mr. Richards, Mr. Turner, and Mr. Chandless, for the different parties.

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The cases referred to were *Alcock v. Sloper* (1), and *Collins v. Collins* (2).

Dec. 23.

THE MASTER OF THE ROLLS (after stating the will) :

The question is, whether this gift to the testatrix's sisters, although contained in what, for other purposes, and in point of form, is a mere residuary clause, does not amount to a specific gift of the fund for the benefit of the tenants for life. Against such a construction it was contended, that the bequest to the sisters was substantially a part of the residuary clause, the effect of which was not to be altered merely because the testatrix had chosen to introduce into it an enumeration of the particular articles of which the residue consisted, and to parcel out the interests of the different persons who were to enjoy it in succession.

(1) 39 R. R. 334 (2 My. & K. 699). (2) 39 R. R. 337 (2 My. & K. 703).

This question is plainly one of intention, to be collected from a careful examination of the whole scope and context of the instrument; and so it has always been considered. After a specific bequest of a part of the stock which the testatrix had, there is here a gift of all she did or might possess in the funds, copy or leasehold estates, to her dear sisters. Now as to the copyhold or leasehold estates, it is not disputed that the gift is specific. If so, why should it also not be specific with respect to the funds? The intention, it is reasonable and natural to presume, must have been the same with respect to both descriptions of property; and there can be no doubt that a bequest of all that a testator may possess in the funds, would be a specific bequest of all his funded property, the rule being that the legacy is not the less specific for being general.

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The true test by which to try whether a bequest is or is not specific is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts,—to inquire whether or not, in such a case, the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specified kind, would not, I apprehend, be bound to contribute; and there is nothing in the particular expressions employed in the will under consideration to make a difference in that respect. Upon the terms used in this will, therefore, which, it may be observed, are plainly distinguishable from those which occurred in *Alcock v. Sloper* (1), I am of opinion that this is a specific bequest of a sum invested in the Long Annuities, and to be enjoyed by the tenant for life in the state in which the testatrix left it.

[117]

There is another reason for coming to that conclusion; not so strong, indeed, as existed in the case of *Alcock v. Sloper*, in which it formed the sole ground of Sir J. LEACH's judgment, but certainly assisting and confirming the view I have already taken. In *Alcock v. Sloper* there was nothing in the words themselves which gave a specific character to the legacy; but his Honour considered that the gift was in a sense specific, because there was to be a specific ownership of the income of

(1) 39 R. R. 334 (2 My. & K. 699).

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the general estate, and that the peculiar nature of the direction respecting the conversion furnished a sufficient indication of intention that the property should continue to be enjoyed by the tenant for life as it then existed. The same inference of intention may, I think, be drawn, though not so conclusively, from the general nature of the provisions contained in this will.

[118]

Upon these grounds, I am of opinion that the Long Annuities in question are to be enjoyed by the tenant for life as a specific bequest, and the bill must, therefore, be

Dismissed.

CHERRY v. MOTT.

(1 My. & Cr. 123—134; S. C. 5 L. J. (N. S.) Ch. 65.)

1835.
Dec. 7.
1836.
Jan. 12.

Rolls Court.
PEPYS, M.R.
[123]

A testator, reciting his intention, if he recovered his health, of contracting with the governors of Christ's Hospital for the purchase of a presentation of a boy to that charity, the son of a freeman of the borough of H., by the mayor and aldermen of the borough, desired that if the money arising from his residuary personal estate should be sufficient for the purpose, the contract should be made. The contract having failed in consequence of the governors demanding a price exceeding the amount of the testator's residuary personal estate, the Court held that the testator's charitable intent could not be executed *cypres*, and that the bequest was totally void.

BENJAMIN CHERRY made a codicil to his will in the following words: "And whereas it is my intention, if it please God to restore me to my health, to see the governors of Christ's Hospital, and to contract with them for the purchase of a presentation of a boy to that charity, the son of a freeman of the borough of Hertford, by the mayor and aldermen of the said borough; now, should I not live to make the contract, I beg, if the money arising from my personal estate shall, after payment of my just debts, funeral expenses, legacies, legacy duty, and other matters hereinbefore mentioned, be sufficient to make the contract, I beg they will do so."

The bill was filed by the testator's residuary legatees, and it prayed that the legacy given by the codicil for the purchase of a Christ's Hospital presentation might be declared void. The case, after being partly argued on a former day, stood over, by the direction of his Honour, that the *Attorney-General*, as representing

the Crown, and having a possible interest adverse to the corporation of Hertford, might be brought before the Court.

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The cause now came on again.

Mr. Pemberton and Mr. Wilbraham, for the plaintiffs:

* * That object is of so very special and peculiar a kind, [124]
that if, for any reason, it has become impossible to carry it into
effect exactly in the mode which the testator contemplated,
the Court would *not be justified in applying the fund to any [*125]
other analogous object upon the principle of *cyprès*.

Mr. Bickersteth and Mr. Daniell, for the governors of Christ's Hospital, stated that the governors had refused the sum offered by the executors, because it would not be an equivalent for the expense entailed on the establishment by the maintenance of an additional boy. The arrangement on the terms proposed, instead of a benefit, would be a burthen to the institution.

Mr. Barber and Mr. Girdlestone, jun., for the corporation of Hertford [cited *Baylis v. Church* (1), *Attorney-General v. Boulton* (2), *Attorney-General v. Andrew* (3), *Moggridge v. Thackwell* (4), and *Mills v. Farmer* (5)]. The application of the principle of *cyprès*, so far from being impracticable, will here be unusually easy. Nothing can be simpler than for the corporation of Hertford, either to come to an arrangement with the governors of the Hospital for the purchase of a qualified right of presentation, say for a limited time, or once in twenty years, for example; or, if that cannot be done, to employ the fund at their disposal in endowing an exhibition at some similar institution, to be enjoyed by the objects whom the testator has indicated. The particular purpose may have failed, but the nomination of the corporation of Hertford as trustees of the charity remains in force, * * and the corporation will be [127]
entitled to go before the Master and submit a scheme to him [128]
for the future application and management of the charity.

(1) 2 Atk. 239.

(4) 6 R. R. 76 (7 Ves. 36).

(2) 2 R. R. 265 (2 Ves. Jr. 380).

(5) 13 R. R. 247 (19 Ves. 483).

(3) 4 R. R. 110 (3 Ves. 633).

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Mr. Wray, for the Crown [cited *Da Costa v. De Pas* (1)].

Mr. Richards, for the executors, stated that the residuary personal estate, after discharging all other claims upon it, would probably not exceed 1,600*l*.

Mr. Pemberton, in reply :

[129] * * A charity of this peculiar nature can never be executed *cyprès*, nor has the application of the doctrine of *cyprès* ever been carried to that extent. No general purpose of charity is indicated in the codicil ; a specific appropriation of a sum is directed, and that appropriation fails, not because Christ's Hospital is unwilling to sell the privilege at a stated sum, but because the testator has not left a fund sufficient to satisfy the sum required. In all the cases of the *cyprès* execution of a charity there has either been indicated a general charitable purpose, and no particular objects of bounty have been pointed out ; or there has been a general direction to lay out money *in charity, followed by a recommendation of particular objects, and those objects have failed. [*130] The Court must find, not only a general and overruling charitable intent, but also a fund defined and ascertained, or capable of being so : *Chapman v. Brown* (2), *Attorney-General v. Hinxman* (3). Both these circumstances concurred in *Attorney-General v. Bowles* (4), and *Moggridge v. Thackwell* (5) ; and neither is to be found in this case. The only case which at all resembles the present is *Attorney-General v. Andrew* (6), and in that there was no final decision, the suit having been ultimately compromised. In *Attorney-General v. Bishop of Oxford* (7) a sum was bequeathed to build a chapel at Wheatley, and when, in consequence of the refusal of the Bishop to sanction the design, it became impossible to fulfil the testator's wishes, the fund was held not to be applicable to any other charitable purpose of a like kind, but to sink into the residue undisposed of. * * *

(1) 19 R. R. 104 (Amb. 228 ; 2 Swanst. 487, n.).

(2) 5 R. R. 351 (6 Ves. 404).

(3) 22 R. R. 119 (2 Jac. & W. 270).

(4) 2 Ves. Sen. 547.

(5) 6 R. R. 76 (7 Ves. 36).

(6) 4 R. R. 110 (3 Ves. 633).

(7) 1 Br. C. C. 444, n. ; see 4 R. R. 262.

THE MASTER OF THE ROLLS, after stating the codicil, proceeded as follows :

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MOTT.

1836.
Jan. 12.

[131]

The question is whether this be a good charitable legacy, the governors of Christ's Hospital appearing by their counsel and declining to accept the sum offered, upon the condition imposed.

It has been argued that Christ's Hospital possesses real estates, and that the legacy if carried into effect would amount to the purchase of an interest in and out of such real estates, and be therefore void by the Mortmain Act. If my decision did not proceed upon other grounds, it might be necessary to obtain better information than what is now before me upon this subject; but the view I take of the case renders it unnecessary for me to enter into the consideration of that point.

This legacy is conditional. There is no gift, if the personal estate be not sufficient to fulfil the contract; and it appears that such is the case, the governors declining the sum offered on the ground of its inadequacy. Indeed, from the rules applicable to charity legacies, such must be the case. Part of the testator's property consists of personalty of such a nature, or in such a state of investment as cannot be applied to purposes of charity. There being no marshalling in favour of a charity legacy, the general personal estate, mixed and pure, must in the first place be considered as apportioned for the purpose of paying the several legacies. If, therefore, the price at which the governors would be willing to contract could be ascertained, that price so apportioned would be contributed partly by the personal estate applicable to the payment of charity legacies, and partly by the personal estate which is not so applicable; and as the former only could be taken, the *sum applicable must of necessity fall short of the amount required to perform the contract, so that the event never can arise, upon the happening of which the legacy is to depend. There never can be money arising from the personal estate sufficient to make the contract. If this view be correct, the legacy must fail, for there may no doubt be a conditional legacy to a charity as well as for any other purpose.

[*132]

Another objection is that this is a gift for a particular purpose which cannot take effect by reason of the refusal of the governors, and that it, therefore, fails altogether. In support of this

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proposition reliance is placed on the case of *Attorney-General v. Bishop of Oxford* (1), which is fully stated in the judgment in *Corbyn v. French* (2). That was the case of a legacy given to build a church at a particular place, and the Bishop and parson objecting, the Court held that a church could not be built elsewhere. In *Corbyn v. French* the legacy was to the trustees of a chapel for the purpose of discharging a mortgage thereon. The mortgage, it turned out, had been previously paid off by other means. Lord ALVANLEY decided that the legacy was void by the Mortmain Act, and that it was also void because the object intended could not be effected, and there was no ground to apply it to any other purpose.

[*133]

In *Attorney-General v. Andrew* (3) there was a gift to Trinity College, Cambridge, upon condition of the college founding scholarships for persons educated at Merchant Tailors' School. The college refused to accept the legacy upon the condition imposed. Lord ROSSLYN did *not decide whether the legacy could be executed *cypres*, but referred it to the Master to receive a proposal on the part of the Merchant Tailors' School for the establishment of a charity within the terms of the founder's will.

In *Attorney-General v. Boulton* (4) Lord ALVANLEY approves of *Attorney-General v. The Bishop of Oxford*, and lays down the distinction between legacies to charities which fail because they cannot be executed, and those which the Court executes *cypres*. He says, if the intention cannot be extended literally, the Court will adopt a mode consistent with the general intention, so as to execute it, though not in mode, in substance.

In *Mills v. Farmer* (5), Lord ELDON in discussing the doctrine of *cypres* considers the rule as applicable to the mode and not to the substance of the legacy; though certainly in a very extended sense; for in many cases where the mode fails, the Court considers charity as the legatee; and therefore the Court applies a practicable and legal in the place of an impracticable and illegal mode.

In this case, however, there is no gift, except in the direction

(1) 1 Br. C. C. 444, *n.*; see 4 R. R. 262.

(2) 4 R. R. 254, see p. 262 (4 Ves. 431).

(3) 4 R. R. 110 (3 Ves. 633).

(4) 2 R. R. 265 (2 Ves. Jr. 380).

(5) 13 R. R. 247 (19 Ves. 483).

to do that which cannot be effected. It is not within the principle of those cases in which the Court executes a general purpose *cypres*, the particular mode being impossible.

Another objection to this legacy, nearly connected with the first, is that it is impossible to ascertain what sum can be administered in any charitable disposition. The sum is so much as shall be necessary to effect the *contract, an amount which could only be ascertained by the contract itself, if capable of being effected; but as that cannot be, the possibility of ascertaining the sum fails. The Court cannot take the statement of the governors as to the sum at which they would have contracted, nor is that the rule prescribed by the testator. A difficulty of much the same kind occurred in *Chapman v. Brown* (1), which was a legacy to build a chapel where most wanted, and with the overplus to endow a minister, and to apply any further overplus in general charity. Sir W. GRANT held the gift to build the church to be void, and the endowment of the minister to fail with it, and also the general gift of the overplus, upon the ground of the impossibility of ascertaining what would have been the expense of building the church, and therefore what would be the residue. The decision in *Attorney-General v. Hinzman* (2) proceeded upon the same principle.

Upon these grounds and authorities, I think the legacy in this will fails.

SHAW v. RHODES (3).

(1 My. & Cr. 135—162; affirmed on appeal to the House of Lords under the title of *Evans v. Hellier*, 5 Cl. & Fin. 114—128.)

A testator devised his freehold and copyhold estates, charged with annuities for his sons and daughter, upon trust, to invest and accumulate the surplus produce thereof for the benefit of his grandchildren then born or thereafter to be born, until the youngest should attain twenty-one, when the accumulations were to be equally divided among such of his said grandchildren as should then be living; and he directed that, in case any of his said sons and daughter should be living after the youngest of his grandchildren should have attained twenty-one, the residue of the said rents and profits should be further accumulated, and that such last-mentioned accumulation should be equally divided among

(1) 5 B. R. 351 (6 Ves. 404).

(3) *Barrington v. Liddell*, (1852) 2

(2) 22 B. R. 119 (2 Jac. & W. 270). De G. M. & G. 480; 22 L. J. Ch. 1.

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[*134]

1835.
Dec. 5.
1836.
Feb. 27.

Lords Com-
missioners
PEPYS and
BOSANQUET.

1837.
June 12, 13.
July 17.

On Appeal to
House of
Lords.

LORD
COTTENHAM,
L.C.
LORD
BROUGHAM.

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all his grandchildren who should be living at the death of the survivor of his said sons and daughter; and, charged as aforesaid, he directed that, immediately after the decease of such survivor, the whole of his said estates should stand charged for twenty years with the payment of two third parts of the clear produce of his said estates, in equal shares and proportions of so much money as would, in fifteen years, make in the whole 30,000*l.*, which sum, with the interest and produce thereof, he directed should be divided equally among all his grandchildren who should live to attain the age of twenty-one, their executors or administrators. The testator died in the year 1812, leaving ten grandchildren, of whom nine were the children of one of the annuitants, and the tenth was the child of a son of the testator, who died before the will was made: no grandchildren were born afterwards, but those who survived the testator lived to attain twenty-one, the eldest having come of age before the execution of the will, and the youngest, in the year 1830: the last survivor of the testator's children died in the year 1831:

Held, that the limitation creating a charge of two thirds of the produce of the estates for twenty years, was a provision for accumulation within the meaning of the 39 & 40 Geo. III. c. 98; that it was necessarily to be connected with the two prior trusts for accumulation, which determined in the year 1831; and that it was therefore effectual for two years only, and was void for the remaining eighteen, being the period by which, when superadded to the duration of the preceding trusts, it exceeded the limits within which accumulation was allowed:

Held also, that such limitation for the benefit of the grandchildren was not a provision for raising portions for the children of a person taking an interest under the devise, within the exception contained in the second section of the Act.

THOMAS SHAW HELLIER by his will dated the 4th of July, 1812, devised all his manors, messuages, lands, tenements, and hereditaments, freehold and copyhold, to trustees upon trust, to pay out of the rents and profits thereof to his son James Shaw 400*l.* a year, for the maintenance and support of himself and family; to his son Theophilus Shaw 100*l.* a year for his life; to his daughter Mary Yates, wife of R. Yates, 100*l.* a year for her life; the annuity to his daughter not to be liable to the debts or control of any husband; and he directed that the legatees, who should become entitled to any annual payment or to the accumulations thereafter mentioned, should not be paid by anticipation, and that *his trustees should, out of the rents and profits, keep the said messuages and tenements in repair.

[*136]

The will then proceeded as follows: "I will and direct that my said trustees, and the survivor of them, his heirs and assigns, shall from time to time lay out and invest the surplus of the produce thereof in Government or on real securities, in their or

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RHODES.

his own names or name, in order that the same may accumulate for the benefit of my grandchildren now born, and at school, or resident at my house called Woodhouse, in the parish of Wombourn, and who bear the several names of Elizabeth Shaw, Parthenia Shaw, Mary Shaw, Thomas Shaw, Ann Shaw, Sarah Shaw, James Shaw, Samuel Shaw, and Emma Shaw, and Thomas Shaw, now resident with his mother at Oxford, or at any time hereafter to be born, until the youngest grandchild shall attain his or her age of twenty-one years, at which time I will and direct that my said trustees or trustee for the time being do and shall divide and pay to and among all such of the said children, my said grandchildren, as shall then be living, the said accumulations in equal shares and proportions; and in case any or either of my said sons and daughters shall happen to die before the time that my youngest grandchild shall attain his or her age of twenty-one years, leaving any child or children, then I will and direct that a like annual sum as the parent of such child would be entitled to receive, had he or she been living, shall be applied and paid by my said trustees, or the trustees or trustee for the time being, for and towards the maintenance and education of such respective children or child, in equal shares and proportions, and if but one such child, then the whole of each parent's annual sum, to and for the use of such child, and if either of them my said sons or daughter happen to die without leaving any children or child, him or her surviving, then the annual sum hereby directed to be *paid to him or her shall become and be part of the said accumulations; and I will and direct that such said annual sum shall be paid to the respective children or child of such of them my said sons or daughter as may happen to die in the lifetime of the survivors of them my said sons and daughter, until the decease of my said sons and daughter.

[*137]

And I will and direct that the residue of the said rents and profits of my said estates shall be further accumulated, in case any of them my said sons or daughter shall happen to be living after the youngest of my grandchildren shall have attained his or her age of twenty-one years; and that such last-mentioned accumulation shall be divided and paid to such and every of my

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grandchildren which shall be living at the death of the survivor of them my said sons and daughter, in equal shares and proportions; and if but one such grandchild then the whole of such last-mentioned accumulations shall be paid to such only grandchild his or her executors, administrators or assigns. * * *

And I do hereby (subject and charged and chargeable as aforesaid) will and direct, that from and immediately after the decease of the survivor of them my said sons and daughter, the whole of my said freehold and copyhold estates shall stand and be charged for twenty years with the payment of two third parts of the clear produce of my said freehold and copyhold estates, in equal shares and proportions of so much money as will in fifteen years make in the whole 30,000*l.*, and which said sum, with the interest and produce thereof, I will and direct shall be equally divided between and among all my grandchildren who shall live to attain the said age of twenty-one years, their executors or administrators, in equal shares and proportions; and if there shall happen to be but one *such younger grandchild, then the whole of the said sum shall be paid to such one younger grandchild." And charged and chargeable as aforesaid, the testator devised all his freehold and copyhold estates to Thomas, the eldest son of his (the testator's) son James Shaw, in tail, with divers remainders over.

[*138]

The testator died on the 10th of July, 1812, and left the two sons and daughter mentioned in his will, his only children. Shortly afterwards a suit was instituted in order to have the property administered under the authority of the Court, and a decree directing the usual accounts and inquiries was made in that suit. No grandchildren were born after the execution of the will; but the ten who were therein named survived the testator, and lived to attain twenty-one, the eldest, Elizabeth Shaw, being of age at the date of the will, and the youngest having come of age on the 31st of August, 1830. Nine of them were the children of the testator's son James Shaw, to whom an annuity of 400*l.* was given by the will; and the tenth was the child of another son, who was dead at the time when the will was made. Mary Yates survived her two brothers, and died in the month of September, 1831; and then the question, for the

first time, arose with respect to the meaning and legal operation of the clause in the will by which, upon the death of the last survivor of the testator's children, the sum of 30,000*l.* was charged upon two thirds of the rents and profits of his real estates, for the benefit of such of his grandchildren as should live to attain the age of twenty-one.

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By the decree made by the VICE-CHANCELLOR on further directions, and bearing date the 2nd of June, 1832, it was, among other things, declared that the gift of 30,000*l.* mentioned in the will was a charge upon the estates and premises therein comprised, and that the grandchildren of the testator who lived to attain *the age of twenty-one years, respectively, were entitled to the said sum of 30,000*l.*, to be raised in twenty years, to be computed from the day of the death of Mary Yates, out of the two third parts of the rents and profits of the freehold and copyhold estates, in equal shares and proportions, by annual payments of 1,500*l.*, to be deducted out of the rents and profits of the said estates.

[*139]

The testator's grandson Thomas Shaw, who had subsequently taken the name of Hellier, and who was tenant in tail of the estates in question under his grandfather's will, presented an appeal against this part of the decree.

The appeal was originally heard by Lord Chancellor BROUGHAM, before whom it was fully argued by *Mr. Pepys*, *Mr. Beames*, and *Mr. Spence*, in support of the appeal; and by *Sir Edward Sugden*, *Mr. Treslove*, and *Mr. Ching*, for the respondents. [His Lordship determined to send a case to law.]

1833.
Dec. 6, 7.

It having been found impossible to frame a case which would fairly submit the point to be determined, as a legal question, to the court of law, an application was made to the Lords Commissioners for leave to have the appeal reheard; and leave having been accordingly granted, the question now came on to be again argued.

1835.
Dec. 5.

[141]

Mr. Beames, *Mr. Preston*, and *Sir W. Follett*, for the appellant:

* * A charge of this description, by which the rents and profits of an estate are withdrawn from the person entitled to

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the *corpus* of the property, and formed into a fund which, at the end of a series of years, is to be distributed among a particular class of individuals, is to all intents and purposes, in substance as well as in form, an accumulation, and falls directly within the mischiefs against which the Thellusson Act was intended to guard.

* * The testator died in the year 1812, and his last surviving child in the year 1831. The youngest grandchild came of age in the year 1830. According to the prior trusts, the rents and profits were to accumulate during the lives of all the children; and by virtue of the trust more immediately under consideration, the accumulation was to go on for a period of twenty years after the death of the last survivor of his children. The result of the whole would be this, that a trust accumulation of rents and profits has been directed to continue for a period of thirty-nine years after the testator's death,—nineteen years longer than, according to the provisions of the statute, such an accumulation would be legal; and to that extent, therefore, the trust must be declared void.

[146]

Sir W. Horne, Mr. Treslove, Mr. Wigram, Mr. Duckworth, Mr. Ching, Mr. Hayter, and Mr. Bethell, for different parties interested in supporting the VICE-CHANCELLOR'S decree :

* * The only serious question arises upon the construction of the Thellusson Act as applied to the directions contained in the third clause of the will; and upon this point the argument on the other side has studiously confounded a trust for accumulation with a charge—things which, in their nature, are perfectly distinct. * * *

[150]

In the present case, the several grandchildren become entitled *de anno in annum* to an aliquot portion of the yearly appropriation; they may pledge, or sell, or bequeath it, or, if the Court approve, may have maintenance allowed out of it, so that the money is in truth capable of immediate enjoyment. The direction that, when 30,000*l.* shall have been recovered out of the rents, the gross sum shall be divided “with the interests and profits thereof”—the only expression in the clause which looks like accumulation,—is no more than the law must have otherwise

implied ; for it is the duty of every trustee to whom sums are periodically paid with a view to being distributed at a future time among specified objects, to lay out those sums at interest, as they are received, for the benefit of his cestui que trusts, till the time of distribution arrives. Such a course does not lock up or accumulate the rents and profits any more than an ordinary charge or mortgage, for the devisee subject to the charge may easily exonerate the estate, either by regularly paying 2,000*l.* a year to the trustees, or by at once placing the whole amount in their hands, and reserving to himself annually a proportion of the dividends equivalent to the interest of the instalments of which the payment is thus anticipated.

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Even assuming that the effect of this clause would be to create an accumulation within the meaning of the Thellusson Act, the charge is imposed with a view to provide for grandchildren of whom all but one were the children of a father who was entitled to a large annuity under the will, and to all of whom the testator had distinctly *placed himself *loco parentis*. The trust, therefore, would still fall within the exception contained in the second section, by which it is declared, that nothing in the Act shall extend to any provision for raising portions for "any child or children of any person taking any interest under any such conveyance, settlement, or devise." The construction of that section was considered, although it was not made the subject of judicial determination, in *Bacon v. Proctor* (1).

[*151]

Mr. Beames, in reply, observed, that * * whether the third trust was a charge or a provision for accumulation was immaterial, for its name could not alter its character : but, in point of fact, it was both charge and accumulation ; *and the result of the whole was that the rents and profits were to be laid up, and the payment and enjoyment of them suspended, for a term of eighteen years longer than the period allowed by the Act of Parliament.

[*152]

With respect to the other point, two of the grandchildren named in the will were understood to be illegitimate, and another was the child of one of the testator's sons who died before the

(1) 1 T. & R. 31.

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will was made, and who of course took nothing under it. As to those three, at least, it was clear that they did not fill the character of children of persons taking interests under the devise, as required by the exception in the second section of the statute, and if the charge failed as to some of the objects, it could not be supported for the rest: the Court could not sever the intention, and, recognising one part as valid, reject another part as void. The benefits, besides, which the trust in question purported to bestow on the grandchildren were not given by way of portions, nor did they, upon any fair construction, answer that description. * * *

1836.
Feb. 27.
—

BOSANQUET, J. :

[*153] The LORD CHANCELLOR having been pleased to request my opinion upon this case, which was argued during the time in which I had the honour to sit in this Court under the late Commission, I will state the reasons *which I was prepared to give if the case had been set down for judgment before the expiration of that Commission.

[After stating the will and the facts the learned Judge proceeded as follows:]

[154] On behalf of the grandchildren it is contended that no accumulation of rents and profits is directed, but only a charge created, subject to which the devisee in tail takes the estate. But although the provision for the grandchildren is made in the form of a charge, it does not follow that it does not require an accumulation.

[*155] The preamble of the statute recites that it is expedient that all dispositions of real or personal estates whereby the profits and produce thereof are directed to be accumulated and the beneficial enjoyment thereof postponed, should be made subject to restrictions. If *the provision in question cannot be carried into execution without postponing the beneficial enjoyment of the rents and profits, in order that those rents and profits may be laid up from year to year and applied at a future time to a particular object, it appears to me that such a provision is within the statute. If the disposition be such that accumulation is thereby required, it is within the statute. But whether the

disposition does or does not require accumulation is a question of construction, which must receive the same determination whether the statute be applicable or not, or as if it had never passed.

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Suppose the statute never to have passed, how must the provision of the will have been dealt with under the circumstances as they exist in the present case? There is no immediate gift to the grandchildren; the gift to them is only to be found in the direction to divide, and no division is directed to be made until the amount to be divided has been received. The estate is charged with the payment of so much only of two thirds of the produce as will, in fifteen years, make in the whole the sum of 30,000*l.*, which sum, with the interest and produce thereof, is to be divided. Two thirds of the produce may in some years amount to much more and in some to much less than one fifteenth of that sum, and the whole amount of such two thirds may not be equal to 30,000*l.* in fifteen years, or possibly even in twenty years.

Neither the whole two thirds nor any specified portion of the two thirds is required to be paid. Nor is any sum certain directed to be raised either indefinitely or within a definite period.

The grandchildren who shall live to attain twenty-one, or their representatives, are entitled to receive *30,000*l.* at the end of fifteen years, if two thirds of the produce shall then have amounted to that sum. But they are not entitled to a division amongst them of any portion of the rents and profits *de anno in annum*.

[*156]

The time pointed out for division is the expiration of fifteen years, and I can see no way by which the provision can be carried into effect according to the will of the testator, but to establish a fund by laying up and adding together a certain portion of the rents and profits during fifteen years. If, at the expiration of that time, two thirds of the rents and profits should amount to 30,000*l.*, the grandchildren would be entitled to divide it; if it fell short of that sum they would be entitled to require a further accumulation till the expiration of twenty years, for the purpose of making good the deficiency, and also, I apprehend, of paying interest upon 30,000*l.* from the expiration of the

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fifteen years to the end of the twenty years. The necessary consequence of this arrangement must be, that both the tenant in tail and the legatees would be kept out of the beneficial enjoyment of the rents and profits for fifteen years at least, and possibly for twenty years from the year 1831, when Mrs. Yates died.

No term is created, nor is any power given to raise the money by mortgage or sale for the time during which the estate is charged; and it may be observed that the testator has expressed a strong disapprobation of all anticipation of benefits given by his will, and payable at a future time.

[*157]

There is no doubt that when Mrs. Yates died the interests of the grandchildren, who had all attained twenty-one, were vested interests, being expressly given to them and their representatives; but it is equally clear to my mind that the testator did not intend the *money to be immediately receivable, but intended that the beneficial enjoyment of the annual produce should be postponed till the whole sum to be divided was accumulated.

The question being whether the testator, by the provisions of his will, has required that accumulation should be made, we may put a case to which the limitation of time prescribed by the statute of the 39 & 40 Geo. III. would not apply. The question of construction is independent of the statute; if, according to the true construction, the will requires accumulation, so much of its provisions as falls within the period of limitation will be supported, and so much as goes beyond it will be void.

In the present case the period from the death of Mrs. Yates in 1831 to the 10th of July, 1833, was within the time of limitation, and accumulation was lawful; beyond that period accumulation is prohibited. But suppose all the testator's children and all the grandchildren but two, namely, Thomas the tenant in tail, and the eldest grand-daughter, Elizabeth, to have died, and the two surviving grandchildren to have attained twenty-one in the year 1813, one year after the testator's death, the rents and profits for one year having been divided under the two first clauses, the third clause would come into operation, and might, without being affected by the statute, be acted upon for twenty years, that is, till the 10th of July, 1833. Could it in such a case have

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been contended that Elizabeth was entitled to insist either that her share of the 30,000*l.* should be raised immediately, or that one third or any other portion of the rents and profits should be paid to her annually till she should have received 15,000*l.*? I think not; for Thomas the tenant in tail would have *had a right to say, first, that fifteen years were allowed to make up the money, and, secondly, that, provided so much of two thirds of the rents and profits were annually set apart as would at the end of fifteen years amount in the whole to the sum given, he would be entitled to the interest of the fund in the meantime, the estate being only chargeable with the interest and produce upon the sum given from the expiration of fifteen years. Still, in order to secure the payment of the sum given, at the proper time, a due proportion of the rents and profits must have been laid up during fifteen, or, if necessary, during twenty years, either of which courses might have been taken in the case supposed without any violation of the statute, since the longest period would not exceed twenty-one years from the death of the testator: or, if we suppose the testator himself to have died only a year before Mrs. Yates, whose death took place in 1831, the rents and profits might have been legally accumulated till 1831, and must, I conceive, have been accumulated accordingly to effect the purposes of the will.

[*158]

If such would be the proper construction of the disposition in question in a case to which the statute did not apply, or supposing it never to have passed, it is not to be differently construed, because when properly construed it would be affected by the statute.

I am therefore of opinion, that, according to the sound construction of the third clause in favour of the grandchildren, an accumulation of a portion of the rents and profits is required to be made for a certain period; that such portion of the rents and profits, whatever it may be, is withdrawn from beneficial enjoyment during the period of accumulation, and is a partial accumulation within the meaning of the statute, and *consequently void so far as that period exceeds twenty-one years from the death of the testator.

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It has been contended that this case falls within the exception

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respecting provisions for raising portions for children of persons taking an interest under the devise; but an answer to this argument was given at the Bar, that as two of the grandchildren are not lawful children of their parents (1) they cannot be brought within the exception. The gift is entire to the grandchildren born and named, or to be afterwards born, to be divided amongst them. If the testator intended accumulation for the benefit of any, he intended it for the benefit of all, legitimate and illegitimate. Such a disposition, therefore, if illegal as to any, would be illegal as to all; and, consequently, the excess of accumulation, if void as to any, is void as to all; for it is impossible to say what other disposition the testator would have made, if he had been aware that the disposition which he had made would partially fail in respect of some of the objects of his bounty.

But, independently of this answer, I do not think that the case falls within the meaning of the exception. Where the whole rents and profits are given in the first place to persons during the lives of their parents, with the exception of small annuities only, to be paid thereout to the parents themselves for their own lives, and a gift to the same persons after the death of their parents is superadded, to be paid out of the subsequent rents and profits, I cannot think that the superadded gift is to be considered, within the meaning of the statute, in the nature of a portion to the children of persons taking an interest under the devise (2).

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Upon the whole, therefore, I am of opinion that a partial accumulation of rents and profits has been in effect directed by

(1) This fact did not appear on the pleadings or in the Master's report.

(2) This point was referred to again in the argument upon the appeal to the House of Lords, but not in the judgments. The passage in question is given in 5 Cl. & Fin. at pp. 126, 127, where the respondent's counsel said:

not to consist of a mere legacy of small amount; the words were, "any interest under any such conveyance, settlement, or devise." The Legislature could not have meant, that if the parent took a legacy of a horse or 1*l.* under the will, that was such an interest in the estates as would bring the charge within the exception of the Act.

[5 Cl. & Fin.
126]

The meaning of the exception was, that if the parents of the children took an interest in the estates out of which the accumulations arose, then such accumulations would be protected. But such interest of the parents was

(LORD LYNTHURST: I think the meaning of "any interest" is any interest, however minute.)

The Act would be nugatory if

the will, which is void so far as the period which it includes applies to any time which exceeds twenty-one years from the death of the testator.

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THE LORD CHANCELLOR :

The course which this appeal has taken falls in with the view entertained by Lord BROUGHAM with respect to the propriety of submitting the question to the opinion of a court of law, and it is free from the difficulties with which the proposed order of his Lordship was embarrassed. The peculiar frame and nature of the trusts rendered it hardly possible so to state a case as to bring the question fully and fairly before a court of law in a legal shape; but the same object has been, in a great measure, gained by having the appeal reheard at a time when, in consequence of the seals being in commission, the Court was enabled to receive the valuable assistance of a common law Judge. The result has been, that the Court has now the benefit of the learned Judge's opinion, with which my own entirely agrees.

When this case was argued in the Court below, the direction for accumulating the rents was throughout called a charge, and a sort of meaning was sought to be attached to the expression, as if to distinguish it from a strict accumulation. It is quite clear, however, that the term "charge" may be correctly and properly applied to designate this trust, and that the direction may, notwithstanding, come within the provisions of the statute, the real question being not as to the form of the direction, but as to its substance and effect.

With respect to the meaning of the testator there can be no doubt. The will sets out with creating *two distinct trusts of accumulation, both of which, in the event, were within the legal period, and are admitted to have been, in form as well as an interest of such small amount could bring accumulations within the exception.

(LORD BROUGHAM: Yes, and nugatory also, if words in a will, giving even *M.* to the parent during the period of accumulation would have no effect.)

The scope of the exception was, to protect portions for younger children out of an estate devised to their parents. But this charge was not by way of raising portions, it was giving the whole estate to the children for twenty-one years after the death of their parents.

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substance, accumulations contemplated by the statute. The first was to continue until certain grandchildren, who were designated, should attain twenty-one; an event which happened in the year 1830, eighteen years after the testator's death; the second was to go on until the death of all the testator's children, should any of them be living at the time when the preceding accumulation determined; and the last survivor of those children died in the year 1831. Nineteen years were thus exhausted during the first two accumulations. Then follows the provision which has been termed the third accumulation, by which, being minded to raise the sum of 30,000*l.*, but not to raise it in the ordinary way by sale or mortgage, the testator directs that two thirds of the income of the estates shall be accumulated; that out of two thirds of the rents and profits so much shall be annually laid up as will produce 30,000*l.* in fifteen years; and as he foresaw a possibility that the portion of the rents thus appropriated might not be adequate to realise the specified sum so soon, he extends the period to twenty years. The money was to be realised by means of that appropriation, and the parties interested have a right to insist that the amount shall not be raised in any but the mode and form prescribed by the testator; that is to say, by an accumulation determinable only at the end of a period of fifteen or twenty years.

[*162]

Now, in what conceivable respect does this differ either in form or substance from an ordinary trust for accumulation? It is strictly within the terms of the Act of Parliament, being a direction by which the income of the estate is to be wholly or partially accumulated for a longer period than twenty-one years; for the result of the three successive trusts, if full effect were given to them *all, would be to lock up the rents and profits of the estates, as to the whole for nineteen years, and as to two thirds, for twenty years more.

It appears to me, therefore, that this is in reality an attempt to defeat or evade the operation of the Act of Parliament, and that, for the period by which the third accumulation when added to the others would exceed twenty-one years, the trust must be declared void.

Judgment reversed.

[An appeal was presented to the House of Lords from this decree as reported in 5 Cl. & Fin. 114, under the name of *Evans v. Hellier*. The appeal was heard by the LORD CHANCELLOR (LORD COTTENHAM), and by Lord BROUGHAM, whose judgments are reported at p. 128, as follows:]

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THE LORD CHANCELLOR :

This was a question on the construction of a will, which directed accumulations for a period of twenty years after the death of the survivor of the testator's children. The question was, whether this direction was not void as against the statute 39 & 40 Geo. III. c. 98. There had been a decision of the VICE-CHANCELLOR, who did not think that the direction was void. The case then came before the Lords Commissioners, when the Great Seal was in commission. It was then fully argued and judgment given, and the reasons for that judgment are fully stated in the report. The arguments here do not seem to me to have varied the case, and the reasons which influenced my judgment on the former occasion have not been shaken by what I have since heard; I shall therefore move your Lordships to affirm the judgment of the Court below.

1837.
July 17.
[5 Cl. & Fin
128]

LORD BROUGHAM :

When the cause was before me, I proposed to direct a case at law for the opinion of the common law Judges. There were difficulties in the way of doing that, and so I did not frame the case. When I heard the case I manifested the inclination of my mind, which was at that time in favour of the construction adopted by the VICE-CHANCELLOR. I now entertain considerable doubt whether this will does fall within the Thellusson Act, but not enough to make me differ from my noble and learned friend on the judgment we should now pronounce.

The judgment of the Lords Commissioners was then

Affirmed.

1835.

Dec.

1836.

Jan.

Feb. 27.

March 19.

SKINNERS' COMPANY *v.* IRISH SOCIETY.

(1 My. & Cr. 162—170.)

[THIS was an interlocutory application in a cause which is reported on the hearing in 7 Beav. 598, and was afterwards affirmed by the House of Lords, as reported in 12 Cl. & Fin. 425.]

1835.

Nov. 28.

Dec. 1.

THE ATTORNEY-GENERAL *v.* THE MAYOR,
BAILIFFS, AND BURGESSES OF LIVERPOOL.

(1 My. & Cr. 171—212.)

Rolls Court.

PEPYS, M.R.

[171]

Principles of the Court with respect to *ex parte* injunctions (1).

[IN this case an *ex parte* injunction had been obtained to prevent the corporation of Liverpool from disposing of certain corporate property pending the coming into operation of the Municipal Corporations Act, 5 & 6 Will. IV. c. 76 (since repealed), by which their powers of disposition were to be greatly restricted. The object of the information was ultimately successful, as appears from the report of a supplemental information on the same matter under the title of *The Attorney-General v. Aspinall*, in 2 My. & Cr. 613, overruling a demurrer which had been allowed by the MASTER OF THE ROLLS, as reported in 1 Keen, 513. The LORD CHANCELLOR's judgment, reported in 2 My. & Cr., sufficiently states the substance of the information. The present application was to dissolve the *ex parte* injunction above-mentioned, and the only object of this report is to preserve certain observations of general interest as to the principles of the Court with respect to *ex parte* injunctions which the MASTER OF THE ROLLS delivered on the occasion, when he said:]

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A very wholesome rule, it is true, has been established in this Court; that if a party comes for an *ex parte* injunction, and misrepresents the facts of the case, he shall not then be permitted to support the *injunction by shewing another state of circumstances in which he would be entitled to it: because the jurisdiction of the Court in granting *ex parte* injunctions is obviously a very hazardous one, and one which, though often

[*211]

(1) To be reported in 45 R. R.

used to preserve property, may be often used to the injury of others; and it is right that a strict hand should be held over those who come with such applications. The objection here taken is, not that the facts were not stated, but that the whole law was not stated; that is to say, that the attention of the Court could not have been called to certain provisions of the Act, which would have presented a different view of the case to the mind of the Judge. If fault is to be found with any one, it is, I am afraid, with the Court, which is bound to know every clause in every Act that ever passed,—a degree of knowledge hardly to be hoped for. I never heard the rule carried to this extent, that the party applying is bound to lay the whole law before the Court. I do not find that any mis-statement or omission of any important facts was made on the present application; nor am I at all aware, if the whole law of the case, as far as it can be collected from the Act of Parliament, had been brought under my view, that upon the statement in the affidavit that the defendants were immediately proceeding to act, I should have thought this a case in which it was expedient to permit the defendants to go on until an opportunity was given to have the matter fully heard and discussed. * * *

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In many cases the Court feels that, by granting an injunction *ex parte*, it may be doing an act of extreme injustice. The party against whom such an injunction is granted may possibly be exposed to very great injury by the order being enforced; but when, as here, the injunction is to prevent an alteration in the state of property, to prevent the corporation seal from being put to securities until an opportunity is afforded of having the matter fully discussed, it is not in point of property an injunction which can occasion any mischief whatever.

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Under these circumstances, although, exercising the discretion vested in the Court, I consider it my duty to dissolve the injunction, I do not think that a case is made on which I can dissolve it with costs. The order therefore will simply be, that the injunction be

Dissolved.

1836.
Jan. 6, 19, 23.

Lord
COTTENHAM,
L.C.
[226]

EDWARDS v. JONES.

(1 My. & Cr. 226—240; 5 L. J. (N. S.) Ch. 194.)

The obligee of a bond, five days before her death, signed a memorandum, not under seal, which was indorsed upon the bond, and which purported to be an assignment of the bond, without consideration, to a person to whom the bond was at the same time delivered. The circumstances of the transaction did not constitute, in the opinion of the Court, a *donatio mortis causa*: Held, that the gift was incomplete; and that, as it was without consideration, the Court could not give effect to it (1).

In the year 1819, John Nathaniel Williams, being indebted to Mary Custance in the sum of 300*l.*, gave her a bond for securing that sum with interest. In the year 1828 the said sum of 300*l.* being still due, together with an arrear of interest, amounting to the sum of 123*l.* 15*s.*, a second bond was given by J. N. Williams to Mary Custance, for securing the latter sum with interest thereon.

The whole of the two sums of 300*l.* and 123*l.* 15*s.* remained due, upon the security of the two bonds, at the time of the death of Mary Custance.

On the 25th of May, 1830, only five days before her death, Mary Custance signed the following indorsement upon the bond of 1819: "I, Mary Custance, of the town of Aberystwith, in the county of Cardigan, widow, do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece, Esther Edwards, of Llanilar, in the said county of Cardigan, widow, with full power and authority for the said Esther Edwards to sue for and recover the amount thereof, and all interest now due or hereafter to become due thereon: as witness my hand, this 25th of May, 1830."

[227] The bond of 1828 was usually kept with the bond of 1819. At the time at which the indorsement was signed, the two bonds were fastened together by a pin. Immediately after the indorsement had been signed, Mary Custance delivered or caused to be delivered both the bonds to Esther Edwards, the plaintiff in this suit. The bonds remained in the hands of the plaintiff until the

(1) Such an indorsement might the Judicature Act, 1873, s. 25 (6).
now operate as a complete gift under —O. A. S.

filing of the bill. Mary Custance died on the 30th of May, 1830, having in the year 1829 made her will, in which she did not mention the bonds, or dispose of the residue of her property, but by which she appointed the defendant, Rice Jones, her executor, who duly proved the will. After Mary Custance's death, the defendant, who had been aware in her lifetime of the existence of the bonds, supposing that they had been lost, prevailed upon J. N. Williams, the obligor, to execute a new bond for the amount due upon the two old bonds, and at the same time gave to the obligor a bond of indemnity against any claim which might be made under the old bonds.

In the month of January, 1832, J. N. Williams, the obligor, died, and afterwards his widow and executrix paid to the defendant the amount for which the new bond had been given.

The bill stated that the plaintiff was a niece of Mary Custance, and that Mary Custance had a great affection for the plaintiff, and entertained, and at different times expressed, an intention to give or leave to the plaintiff the bonds, and the money due upon them. It alleged that Mary Custance delivered, or caused to be delivered, to the plaintiff, both the bonds, intending that the plaintiff should be entitled thereto, and to the monies respectively secured thereby, in case of and after the *decease of her the said Mary Custance, and expressing herself to that or the like effect; and the bill also alleged that the bonds, and the money due upon the same, were well given to the plaintiff by Mary Custance, as a gift, or as a *donatio mortis causa*, and that the plaintiff became entitled thereto. The bill then went on to allege that, under the circumstances, the plaintiff was entitled to the sum due on the bonds, and that the defendant, so far as he had a legal right of action upon them, was a trustee for the plaintiff, and that he was a trustee for the plaintiff for the money received by him from the executrix of the obligor.

The prayer of the bill was, that it might be declared that the plaintiff was and is entitled to the principal and interest which was due upon the two bonds, and that the defendant might be declared to be a trustee thereof for the plaintiff, and that an account might be taken of what had been received by the defendant in respect of the several sums secured by the

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bonds, and the interest thereof respectively; and that the defendant might be decreed to pay to the plaintiff what should appear to have been so received by him, with interest thereon from the time when the same was received; and in case it should appear that the defendant had not received from the estate of John N. Williams, the obligor, the whole of the principal and interest, then that the plaintiff might be at liberty to take such proceedings as she might be advised for the recovery thereof, in the name of the defendant; and in case it should appear that the defendant had released or discharged the estate of J. N. Williams, the obligor, from the debt, without receiving the whole thereof, then that the defendant might be decreed to make good the same.

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It appeared, by the evidence, that the indorsement was written upon the bond before the day on which it was signed by Mary Custance; and that at the time at which she signed it, although upwards of eighty years of age, and labouring under a very painful disease,—cancer in the breast,—she was not worse in health than she had been for some time previously, and that she was not in bed, and that it was not then expected by those about her that her death would occur so soon afterwards as it did. It appeared also that the transaction took place about seven o'clock in the morning, all parties desiring that it should be concealed from a sister of Mary Custance; and it was proved that Mary Custance accompanied the act of signing the indorsement, by saying, that she was thereby giving the Castle Hill money (by which term she was accustomed to designate the money due upon the bonds) to the plaintiff.

The cause was heard before the Vice-Chancellor, who dismissed the bill with costs. The plaintiff now appealed from his Honour's decision.

Mr. Jacob and Mr. Blake, for the plaintiff:

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* * In the present case, there was not only an assignment but an actual transfer of that which constituted the title to the property. A bond is a thing which may be made a subject of voluntary assignment *inter vivos*, so as to bind the donor.

If this gift, however, cannot be established as a *donatio inter vivos*, it will take effect as a *donatio mortis causâ*. To constitute

a *donatio mortis causá*, it is not necessary that the gift should be expressly made on condition of being returned if the donor recovers : *Gardner v. Parker* (1), *Lawson v. Lawson* (2).

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[Some other cases cited by counsel are referred to in the judgment.]

Mr. Kindersley and *Mr. Richards*, for the defendant :

The case made by the bill is simply that of a memorandum importing, and stated by the giver to import, that in case of and after the death of the donor, the *subject should belong to the donee. The transaction can amount only to a particular form of *donatio mortis causá*. The plaintiff's sole case is, that the intention, as expressed by the deceased, was, "if I die, and when I die, you shall have these bonds." * * *

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It is a mere question of fact, whether the transaction was an absolute gift, or a gift on a condition *mortis causá*. The plaintiff does not pretend that the two bonds passed by the indorsement made on one of them; but she says that one passed by the assignment *inter vivos*, and the other by a *donatio mortis causá*. If the indorsement amounts only to a voluntary agreement, the Court will *not interfere. The relation of trustee and cestui que trust has not been established. The supposed assignment amounts to no more than a mere agreement. If the plaintiff's argument is good, it is strange that, in previous cases of *donatio mortis causá*, it should not have been contended that the gift was good as a gift *inter vivos* if it failed as a *donatio mortis causá*.

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Mr. Jacob, in reply. * * *

THE LORD CHANCELLOR [after stating the substance of the bill]:

Jan. 23.

The case being thus stated in the bill, it was argued at the Bar that the bonds were delivered either by way of *donatio mortis causá*, or as a gift *inter vivos*; one question being, whether on the face of the record there was such an allegation as entitled the plaintiff to raise the latter point. Now, in order to be good as a *donatio mortis causá*, the gift must have been made in

(1) 18 R. R. 213 (3 Madd. 184).

(2) 1 P. Wms. 441.

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contemplation of death, and intended to take effect only after the donor's decease. And so the bill treats it; for it *alleges that such was the intention of the testatrix. If it appeared, however, from the circumstances of the transaction, as stated, that the donor really intended to make an immediate and irrevocable gift of the bonds, that would destroy the title of the party who claims them as a *donatio mortis causâ*; a proposition which is distinctly laid down in *Tate v. Hilbert* (1), where a claim to property on the ground of its having been a *donatio mortis causâ* was held to have failed, because, upon the facts disclosed, it appeared to be a transaction of present gift.

Several cases were cited for the purpose of controverting that proposition, and shewing that words of gift might operate by way of *donatio mortis causâ*. Of these the principal were *Gardner v. Parker* (2), and *Lawson v. Lawson* (3); which cases, however, so far from disproving the proposition, actually assumed it throughout. Those cases turn only upon the question, whether, notwithstanding the words used, the accompanying circumstances were not such as to lead to a legal presumption that that mode of title was contemplated by the donor which is constituted by a *donatio mortis causâ*. In the latter case, the testator gave a purse of 100 guineas to his wife, and desired her to apply it to no other use but her own. That case was never intended to infringe upon the former authorities. The reasoning of the Court was, that the donor, from the language he used, must, of necessity, have contemplated his own death when he made the gift; for the money was to be applied to the wife's own use, and not to any use in which the husband was to participate; and upon that ground the Court came to the conclusion, that although the words purported to be words of present gift, the accompanying *words were such as shewed that it was a gift in contemplation of death.

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The rule, therefore, remains unaffected by any decisions on the other side; and we have now to look at this gift, to see whether the circumstances which attended it can be considered as importing a *donatio mortis causâ*. Now, the transaction

(1) 2 R. R. 175 (2 Ves. Jr. 111).

(3) 1 P. Wms. 441.

(2) 18 R. R. 213 (3 Madd. 184).

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certainly cannot prevail as a *donatio mortis causâ*. In the cases referred to, there was no written instrument or memorandum,—nothing but a mere general expression of gift,—and the Court founded its conclusion upon the circumstances with which the gift was attended. In the present case, however, the transaction is in writing, and therefore, in looking for the intention, we are confined to the language in which that intention is expressed. It may be observed, that the very fact of the transaction being in writing is a strong circumstance against the presumption of the gift being intended to operate as a *donatio mortis causâ*. Here is an instrument purporting to be a regular assignment, exactly in the same form as where the purpose is absolutely and at once to pass the whole interest in the subject-matter. A party making a *donatio mortis causâ* does not part with the whole interest, save only in a certain event; and it is of the essence of such a gift, that it shall not otherwise take effect. A *donatio mortis causâ* leaves the whole title in the donor, unless the event occurs which is to divest him. Here, however, there is an actual assignment, by which the donor, Mrs. Custance, transfers all her right, title, and interest in the subject to her niece: and that is really the whole evidence of the transaction; for the testimony of several persons who were present proves that it was intended as a gift; and though others speak as to an intention being expressed inconsistent with the written document, very little attention can be paid to *state-

ments of what passed, when contradicted by the act of the party as evidenced by a written instrument. Independently of all the other circumstances, therefore, and independently of the grounds taken by the VICE-CHANCELLOR in his judgment, I consider the language of the assignment sufficient to prevent this transaction from being considered as a good *donatio mortis causâ*. There is not very precise evidence as to the time when these bonds got into the possession of the plaintiff. There is also a defect of evidence to shew that at the time at which the transaction took place, Mrs. Custance was in such a state of illness, or expectation of death, as would warrant a supposition that the gift was made in contemplation of that event. These considerations, however, do not appear to be very material, because I consider

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the language of the assignment itself to exclude the possibility of treating this as a *donatio mortis causâ*.

The first question upon the other point is, whether the plaintiff has in this suit claimed the property as an absolute gift. The bill has, in fact, negatived the case of gift; for it states, that the donor intended that the delivery should operate as a *donatio mortis causâ*. Having made that allegation of fact, it is immaterial that there should be, in another part of the bill, an allegation stating a conclusion of law. If the question turned upon that point, if there were a case which would appear to constitute a gift, the Court would give effect to it. Such, however, is not the case, because, whatever might have been alleged on the record, there was no ground for supposing that a case could be established which would support the transaction as a gift.

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The transaction being inoperative for the purpose of transferring the bond, which was a mere chose in action, *the question comes to be, whether the mere handing over of the bond,—supposing the record so to have stated the facts as to have entitled the plaintiff to make such a claim,—whether such a transaction would constitute a good gift *inter vivos*; that is to say, whether the plaintiff would be entitled to the assistance of a court of equity, for the purpose of carrying into effect the intention of the parties. Now, it is clear that this is a purely voluntary gift, and a gift which cannot be made effectual without the interposition of this Court. The circumstance of the bond having been afterwards paid, and the money having got into the hands of the defendant, cannot make any difference in the determination of the question, which must depend upon the same principles as if it had arisen before.

The rule that this Court will not aid a volunteer to carry into effect an imperfect gift has been established by many decisions, and in particular by *Colman v. Sarrel* (1), *Ellison v. Ellison* (2), and *Ex parte Pye* (3). The case of *Antrobus v. Smith* (4) comes nearer to the circumstances of this case than any of those which have been referred to. There was in that case an indorsement

(1) 1 R. R. 83 (1 Ves. Jr. 50).

(2) 6 R. R. 19 (6 Ves. 656).

(3) 11 R. R. 173 (18 Ves. 140.)

(4) 8 R. R. 278 (12 Ves. 39).

pretty much in the same language with the present assignment; and the general doctrine there laid down by Sir WILLIAM GRANT is extremely applicable here. In order to bring this transaction within the rule, that if there be a trust created, and the relation of trustee and cestui que trust once constituted, the Court will execute the intention, it was argued here that the defendant became a trustee for the donee. The same argument was used in the case of *Antrobus v. Smith*, and it was met by Sir W. GRANT with this observation: "Mr. Crawford was no otherwise a trustee, *than as any man may be called so who professes to give property by an instrument incapable of conveying it. He was not in form declared a trustee; nor was that mode of doing what he proposed in his contemplation. He meant a gift. He says he assigns the property. But it was a gift not complete. The property was not transferred by the act. Could he himself have been compelled to give effect to the gift by making an assignment? There is no case in which a party has been compelled to perfect a gift, which in the mode of making it he has left imperfect. There is *locus penitentie* as long as it is incomplete." Every word of that judgment applies directly to the circumstances of the present case. It is impossible, indeed, to distinguish the two cases; and it is equally impossible to question the doctrine there laid down.

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It was said, however, that there were two later decisions interfering with this doctrine: *Sloane v. Cadogan* (1) and *Fortescue v. Barnett* (2). Now it is sufficient to prevent those cases from applying, that in neither of them was any intention expressed by the learned Judge to depart from the established rule, but that in both, the decision turned upon the question of fact, whether or not the relation of trustee and cestui que trust was actually constituted. In neither was it attempted to make perfect an imperfect gift. In *Sloane v. Cadogan* the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect, but against the persons who had the legal custody of the fund; and the question was, whether the transaction constituted them trustees of the fund for the cestui que trusts. Sir W. GRANT came to the

(1) See Lewin on Trusts.

(2) 41 R. R. 5 (3 My. & K. 36).

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conclusion that it did ; and the consequence was that they were *bound to account. That case has been considered by Sir EDWARD SUGDEN as going a great way ; but, upon the principle stated by Sir W. GRANT, it is free from all possible question, for there was no attempt in that case to call in aid the jurisdiction of this Court.

Fortescue v. Barnett falls precisely within the same observation, although there are some expressions in it, especially where the learned Judge speaks of a bond which has been voluntarily assigned, being considered a debt to the assignee, which probably were not intended to convey the meaning they do. The case itself, and the judgment pronounced upon the facts, do not in any way touch the present question. There, a party had insured a life, and the contract of the office was, to pay to the party insuring, his executors, administrators, and assigns ; but the practice of the office was stated to be, that upon an assignment, the office recognised the assignee, and the policy was, therefore, an assignable instrument. The policy was not assignable at law, but it was a title which, by contract, was assignable as between the parties ; and the party in that case assigned, but the assignee did not give notice to the office, and, consequently, the original insurer dealt with the office, received a bonus, and then surrendered the policy. The MASTER OF THE ROLLS in that case considered, as he naturally would, whether this transaction was not a gift—whether it did not, in fact, confer a title on the assignee ; and if it did, then, consistently with all the authorities, he considered that he was bound to give the assignment its full effect ; and he put his decision expressly upon the fact that the transaction was complete—that there was nothing further for the donor or the donee to do—that the latter had nothing to ask further from the donor. Whether, upon the circumstances of that case, it was right or wrong to come to that conclusion, is a question with *which I have nothing to do. The principle of the decision is quite consistent with the other cases ; for it proceeds upon the same ground, namely, that if the transaction is complete, the Court will give it effect. So far, therefore, are these two cases from being authorities in favour of the gift in the present case, the principle acted upon in them by the learned

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Judges is quite consistent with my refusing to aid the plaintiff in the present bill.

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On the whole, I see no reasonable ground for impeaching the decision of the VICE-CHANCELLOR, and his decree must, therefore, be

Affirmed.

IN THE MATTER OF BRUGES (1).

(1 My. & Cr. 278.)

1836.

Feb. 11.

An inquisition in lunacy having found that a person was a lunatic, and had been in the same state of lunacy from the time of her birth, the inquisition was quashed, and a new commission issued.

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In this case a commission, in the nature of a writ *de lunatico inquirendo*, having issued, it was found by the inquisition, that Sarah Taylor Bruges was a lunatic, and did not enjoy lucid intervals, and that she had been in the same state of lunacy from the time of her birth; but how and by what means she so became a lunatic the jurors knew not, unless by the visitation of God.

A petition having been now presented, praying an inquiry as to the property of the alleged lunatic, and as to the proper committees of her person and estate, the Secretary of Lunatics called the LORD CHANCELLOR's attention to the finding of the inquisition.

Mr. C. Romilly, who appeared in support of the petition, stated that the young lady was able to read, and, therefore, she could not have been found an idiot.

The LORD CHANCELLOR said, that the proper finding would have been that she was of unsound mind; and that the finding, as it stood, was a contradiction in terms. His Lordship therefore ordered that the inquisition should be quashed, and that a new commission should issue.

(1) See now the Lunacy Act, 1890, s. 98 (2).

1836.

Jan. 22.

Feb. 1.

ELLIS v. SELBY (1).

(1 My. & Cr. 286—299; S. C. 5 L. J. (N. S.) Ch. 214; affirming 7 Sim. 352.)

Lord
COTTENHAM,
L.C.
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A testator, after giving a fund to his executors upon certain trusts, declared it to be his will that in the event of the failure of those trusts, an event which happened, his said trustees, and the survivors and survivor of them, his executors or administrators, should pay and apply the fund to and for such charitable or other purposes as they, his said trustees, and the survivors or survivor of them, his executors or administrators, should think fit, without being accountable to any person or persons whomsoever for such their disposition thereof: Held, that these words created a trust, but a trust of so indefinite a nature, that it could not be carried into effect; the bequest, therefore, failed, and the fund fell into the residue.

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PETER RICHARD LAHY by his will, dated the 10th of June, 1815, gave to Thomas Wright, since deceased, and to Nicholas Tuite Selby and Henry Robinson, the sum of 600*l.* Bank stock, being the whole of his property in that fund, upon trust to pay the dividends to Frances Bennet, for her life, for her separate use; and he also gave legacies to different persons, including legacies of 50*l.* a-piece to Wright, Selby, and Robinson; and he devised to William Richard Ellis all his freehold messuages *or tenements in the town of Arundel and in Great Ormond Street, for life, with remainder to his first and other sons successively in tail male; and for want of such issue, he devised all the same premises to Wright, Selby, and Robinson, their heirs and assigns for ever, upon the trusts and to and for the intents and purposes thereafter expressed and declared of and concerning the same. The testator then gave and bequeathed all his stock or funded property in the 4 per cent. and 3 per cent. Consols, 3 per cent. Reduced, and 5 per cent. Navy Bank Annuities, to Wright, Selby, and Robinson, and the survivors and survivor of them, and the executors and administrators of such survivor, upon trust to pay to W. R. Ellis, during his life, the whole of the dividends due or to become due thereon, and, after the decease of W. R. Ellis, upon trust for the benefit of his issue as therein mentioned; and the testator directed, that after the decease of Frances Bennet, his said trustees and the survivors and survivor of them, and the executors and administrators of such survivor,

(1) *In re Jarman's Estate* (1878) 8 Ch. D. 584, 47 L. J. Ch. 675, 39 L. T. 89.

should pay the dividends and profits of his Bank stock to W. R. Ellis, during his life, and, after his decease, for the benefit of his lawful child or children, in such manner as he had thereinbefore willed and directed respecting his stock or funded property; and he thereby declared and directed, that if W. R. Ellis should happen to die without issue male of his body lawfully begotten, the trusts respecting his freehold property should be, that his said trustees should sell and dispose of the same, and pay thereout certain further legacies, and that his said trustees, T. Wright, N. T. Selby, and H. Robinson, should retain to themselves the further legacy of 100*l.* to each of them; and that his said trustees, or the survivors or survivor of them, his executors or administrators, should retain to themselves what should remain in hand from the produce of the sale of his said freehold property after payment *of the last-mentioned legacies, upon trust to pay, apply, and distribute the same, to and for such charitable or other purposes as his said trustees and the survivors and survivor of them, his executors or administrators, should think fit, without being answerable or accountable to any person or persons whomsoever for such their disposition thereof. The testator then expressed himself as follows: "And should the said William Richard Ellis die without issue male or female of his body lawfully begotten, then and in such case my will is, that my said trustees and the survivors and survivor of them, and the executors and administrators of such survivor, do pay or cause to be paid to the said Frances Bennet, from and out of the dividends of my said funded property one annuity or further annual sum of 40*l.* during the term of her natural life; and subject to such annuity, that my said trustees and the survivors and survivor of them, his executors or administrators, do pay and apply the whole of my said funded property, both stock and dividends due or to become due thereon, and also my said Bank stock, from and after the decease of the said Frances Bennet, to and for such charitable or other purposes as they, my said trustees and the survivors or survivor of them, his executors or administrators, shall think fit, without being accountable to any person or persons whomsoever for such their disposition thereof." The testator gave all the residue of his personal

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estate to W. R. Ellis, his executors, administrators, and assigns, and appointed Wright, Selby, and Robinson executors of his will.

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By a codicil, dated the 29th of July, 1818, after reciting that Thomas Wright, one of the executors named in his will, had died, the testator nominated and appointed, and in his place and stead put William Holmes, to be one of his executors, conjointly with N. T. Selby *and Henry Robinson, in his will named as executors; and he did thereby delegate to, and invest the said W. Holmes, conjointly with the said N. T. Selby and H. Robinson, with the like trusts and powers, in all respects, as were by his said will to the deceased T. Wright and the said N. T. Selby and H. Robinson given; and the testator thereby gave and bequeathed to the said W. Holmes a legacy of 50*l.*, and also an eventual legacy of 100*l.*, in like manner as he had by his will given and bequeathed similar legacies to his now co-executors.

By a second codicil, dated the 16th of November, 1820, the testator ratified and confirmed his will, and the first codicil thereto; by such second codicil also, expressly giving, devising, and bequeathing unto the said W. Holmes, his heirs, executors, administrators, and assigns (jointly with the said N. T. Selby and H. Robinson, their heirs, executors, administrators, and assigns), all power, authority, and interest in, over, and upon the several estates and effects in his said will given, devised, or bequeathed to Thomas Wright, jointly with the said N. T. Selby and H. Robinson, in the same manner and for the same purpose as though the name of the said W. Holmes was inserted in the said will in the place and stead of the said T. Wright since deceased, but not further or otherwise.

William Richard Ellis, having survived the testator, died in the year 1831, without leaving any child or children surviving him, having by his will given all his property and effects, of every sort and description, to the plaintiff, his widow, whom he appointed one of his executors, and who alone proved his will.

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The bill was filed by the widow of W. R. Ellis, against the executors of P. R. Lahy, and against the **Attorney-General*, insisting that the bequest in P. R. Lahy's will, to his trustees,

of his funded property and Bank stock, in the event of W. R. Ellis dying without issue male or female of his body, was too remote; or if not, then that the trust upon which that bequest was made to the trustees was too indefinite to be carried into effect, and was, on that account, void, and that, therefore, all the property so bequeathed fell into the residue, to which the plaintiff was entitled.

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Upon the hearing before the Vice-Chancellor, his Honour was of opinion that the gift over to the executors, in the event of the death of W. R. Ellis without issue of his body, was not void for remoteness; but that, except as to the annuity bequeathed to Frances Bennet, it was void for uncertainty, and that the funds in question, subject to the annuity, fell into the residue. The executors now appealed from that part of his Honour's decree which declared that the bequest over to them was void for uncertainty.

Sir William Horne, Mr. Skirrow, Mr. Lynch, and Mr. Blunt,
for the executors :

* * It is to be observed, that the testator desires the executors to apply the fund to charitable or other purposes, in the disjunctive; a circumstance which distinguishes the present case from *Morice v. The Bishop of Durham* (1), where the words used were in the *conjunctive. The executors had certain other trusts to perform under the will, and that circumstance sufficiently accounts for the testator calling them his trustees, in the clause which contains the bequest of the fund. * * The present case is stronger than *Gibbs v. Rumsey* (2), for there were no words there to negative a liability to account. The cases of *Waldo v. Caley* (3), and *Horde v. The Earl of Suffolk* (4), prove that if the present bequest is to be applied to charity, it may be so applied, at the absolute discretion of the executors. [In *James v. Allen* (5), and *Fowler v. Garlike* (6), there was an express trust. In *Johnston v. Swann* (7), decided by Sir J. LEACH in the

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(1) 7 R. R. 232 (9 Ves. 399, and 10 Ves. 522).

(2) 13 R. R. 88 (2 V. & B. 294).

(3) 10 R. R. 165 (16 Ves. 206).

(4) 39 R. R. 136 (2 My. & K. 59).

(5) 17 R. R. 4 (3 Mer. 17).

(6) 32 R. R. 201 (1 Russ. & My. 231).

(7) 18 R. R. 270 (3 Madd. 457).

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year 1819, and in *Jemmit v. Verril*, decided by the same Judge in December, 1826, charitable bequests were established of money applicable at the discretion of trustees.]

(THE LORD CHANCELLOR: The two last-mentioned cases are directly at variance with the other cases on the same subject.)

[293] * * If the testator has created a trust, then this case is like *Waldo v. Caley*; if he has not, it is like *Heneage v. Lord Andover* (1). *Horde v. The Earl of Suffolk* decides that the word "or" creates no uncertainty.

(THE LORD CHANCELLOR: *Waldo v. Caley* was determined before the decision, that a private charity could not be carried into effect by this Court (2); that explains the case, and reconciles it with the other cases. In *Horde v. The Earl of Suffolk*, Sir JOHN LEACH took no notice of the objection, that a private charity could not be carried into effect, although that objection appears to have been urged.)

[294] * * It is to be observed, that in *Fowler v. Garlike* (3) the mere distribution of the fund was left to the discretion of the trustees; here the executors may dispose of the fund as they please. The testator's calling his executors trustees has no effect in creating a trust; if the nature of the bequest were such as to create a trust, a trust would be created, whether they were called trustees or not. If the bequest here had been to charitable or other purposes, without more, it might be said to be void for uncertainty; but the discretion given to the executors preserves it from that construction. The short judgment of the MASTER OF THE ROLLS in *Fowler v. Garlike* cannot be considered to have overruled *Gibbs v. Rumsey*.

The *Solicitor-General*, Mr. Knight, and Mr. Wyatt, for the plaintiff:

* * All principle and all authority, however, shew that the trust created in the present instance is such as cannot be carried

(1) See 24 R. R. 705 (10 Price, 230). (3) 32 R. R. 201 (1 Russ. & My.

(2) See *Ommanney v. Butcher*, 231).
24 R. R. 42 (T. & R. 260.)

into effect: *Morice v. The Bishop of Durham*, *Waldo v. Caley*, *James v. Allen*, *Vezev v. Jamson* (1), *Ommanney v. Butcher* (2). The latter case, if at variance with *Waldo v. Caley*, must be understood to have overruled it, as it was determined at a subsequent period. In *Gibbs v. Rumsey* there was no pretence of a charitable bequest. *Horde v. The Earl of Suffolk* does not, *sub silentio*, overrule *Ommanney v. Butcher*. The cases of *Johnston v. Swann* and *Jemmit v. Verril* are clearly not law. This case falls directly within the principle of the decision in *Williams v. Kershaw* (3), where the words were much less indicative of an intention to vest an absolute discretion in the trustees than the words used in the will now under consideration.

The whole frame of the will in the present case shews that the testator did not intend the executors to take this fund beneficially. The gift is made subject to the payment of the various legacies, among which are legacies to the executors themselves; and the trust is to pay, apply, and dispose of the fund. *Morice v. The Bishop of Durham* proves that if a person takes in trust, he cannot take beneficially; he must take for the purposes designated by the will, if those purposes are certain, or if they are not, then for the next of kin, or residuary legatee.

Sir W. Horne, in reply :

The case of *Williams v. Kershaw* does not affect this question; the fund there could not be divided, but must have been applied to purposes which were not only benevolent, but also charitable and religious. * * *

THE LORD CHANCELLOR [after stating the material parts of the will] :

The clause disposing of the produce of the real estate, upon which no question arises, will be found to be expressed, with a very slight variation, in identically the same words as the clause upon which the present question arises.

It is contended, that under this latter clause the executors took an absolute beneficial gift; that is to say, that as the

(1) 1 Sim. & St. 69.

(2) 24 R. R. 42 (T. & R. 260).

(3) Since reported under its proper

title of *Williams v. Williams* in 42 R. R. 69 (5 L. J. (N. S.) Ch. 84).

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testator in giving the ultimate interest in his personal estate has not used the words "upon trust," with which he had prefaced his disposition of the produce of his real estate, the same words of gift are to receive different constructions, and that, with respect to the personal estate, they are to be taken as giving the beneficial interest, whereas, with respect to the produce of the real estate, they are to be taken as only constituting the donees trustees for charitable uses. If the fund were intended for the executors' own benefit, the testator might have left with them the option of disposing of it; but they are to pay and apply it for certain purposes mentioned in the will. Then, again, the direction to the executors to pay and apply the fund to such charitable or other purposes as they should think fit, is very inconsistent with the notion that they were to be absolutely entitled to it. Again, if the testator intended that they should have it for their own use, it cannot be supposed that he would add a direction that they should pay or apply it for charitable or other purposes without being answerable or accountable. If he intended to give them the property absolutely, such a direction would be quite superfluous, although it is perfectly consistent with an intention on his part to create a general indefinite trust. The argument in favour of the intention to make an absolute gift to the executors was principally

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*rested upon these latter words; but they appear, on the contrary, to establish conclusively that the testator considered he had created a trust, although he did not intend that any power should be given to investigate or compel the execution of that trust. If any doubt, however, remains upon this part of the case, the first codicil effectually removes it. By the will, the testator had originally given to the executors a legacy of 50*l.*, and afterwards a legacy of 100*l.* each, and by the first codicil he makes a provision for the death of one of those executors, and the appointment of another in his stead. The testator by his second codicil repeats his intention of putting Holmes, the new executor, precisely in the situation of Wright, the deceased executor.

In favour of the construction contended for by the defendants, *Gibbs v. Rumsey* (1) was cited and relied upon; but the present,

(1) 13 R. R. 88 (2 V. & B. 294).

like other cases of construction, depends upon the particular language which the testator has used, and very slight expressions may make a most material difference. In *Gibbs v. Rumsey*, Sir W. GRANT was of opinion that the expressions used were only descriptive of absolute ownership, and that the parties were entitled to the property beneficially. Of that case, however, it is sufficient to observe, that it wanted nearly all the circumstances and expressions which are to be found in this will, and which are relied upon as constituting a trust. On the other hand, the circumstances in *Fowler v. Garlike* (1) come much nearer to the present case, although they are less favourable to the argument of the gift being a trust, inasmuch as the will there made no reference or allusion to charity, and it was held "that as it was a mere trust, the objects of the trust were too indefinite, and the trust failed. If the two cases of *Gibbs v. Rumsey* and *Fowler v. Garlike* can stand together, the latter would be a much stronger authority in favour of this being construed as a trust than the former would be in favour of its being construed as an absolute gift. Questions of this kind, however, must be decided upon the construction of the language of the instrument in each particular case, and in this will, I think the trust is very sufficiently declared.

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Another point made was, that the Court would divide the fund between the charity and the other objects; and *The Attorney-General v. Doyley* (reported in a note to *Moggridge v. Thackwell* (2)), was cited upon that point, but, eventually, the point was very properly abandoned.

The question, therefore, remains, whether this gift is too indefinite to be carried into effect. That question is as nearly as possible the same as that which I lately decided in *Williams v. Kershaw*, or, at least, it comes quite sufficiently close to it to bring it within the same principle. In *Williams v. Kershaw* the testator directed his trustees to apply "the residue of the said dividends, interest, and annual produce, to and for such benevolent, charitable, and religious purposes as they in their discretion should think most advantageous and beneficial, and to and for no other

(1) 32 R. R. 201 (1 Russ. & My. 231). thought necessary to retain this note

(2) See 7 Ves. 58, n. It was not in the Revised Reports.

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use, trust, intent, or purpose whatsoever ;" and I came to the conclusion that those words were not to be used in the conjunctive, but that there was a discretion in the trustees to apply the fund. If that construction be right, (and I have seen no reason to alter my opinion) the difference between the expressions *used in that will and the present is not such as to lead me to a different conclusion. In the course of my judgment in that case, I investigated all the authorities which were then brought under my consideration. Some of them, perhaps, were not quite consistent ; but I came to that conclusion upon the authority of two cases decided by Sir W. GRANT. In *Morice v. The Bishop of Durham* (1) Sir W. GRANT lays down the rule in these terms : " The question is not, whether the trustee may not apply it upon purposes wholly charitable, but whether he is bound so to apply it ;" and in *James v. Allen* (2) he says, " If the property might, consistently with the will, be applied to other than strictly charitable purposes, the trust is too indefinite for the Court to execute." In this case, the appellants contend that the latitude given is so great, that the terms of the bequest amount to an absolute gift, and yet they contend that the bequest is so strictly charitable, as to be capable of being carried into effect as such. I am of opinion, however, that the discretion is not so large, as to relieve the gift from being a trust, but that it is too indefinite to be carried into effect, and, consequently, that the gift fails, and that the VICE-CHANCELLOR's decree is right ; but, as the appeal was presented before the decision in *Williams v. Kershaw*, I do not think that it should be affirmed with costs.

1836.
Feb. 13.

Lord
COTTENHAM,
L.C.
[300]

IN THE MATTER OF BLAIR, A LUNATIC (3).

(1 My. & Cr. 300—304 ; S. C. 5 L. J. (N. S.) Ch. 150.)

Payments out of a female lunatic's income, for the better maintenance and support of her nephews, ordered, under the circumstances. The Court, however, makes such orders with great jealousy and caution.

MARGARET BLAIR, the lunatic, was entitled to real and personal estate, which together yielded an income of 2,000*l.* per annum

(1) 7 R. R. at p. 236 (9 Ves. 406).

(2) 17 R. R. 4 (3 Mer. 17).

(3) *In re Darling* (1848) 39 Ch. D.

208, 57 L. J. Ch. 891, 59 L. T. 761.

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or thereabouts, out of which an annual allowance of 670*l.* had been made for her maintenance and support. Edward Ord Warren, the Rev. John Crabbe Warren, and Sarah, the wife of the Rev. Crosbie Morgell, were the lunatic's only next of kin, being the children of her deceased sister. Edward Ord Warren was her heir-at-law and also committee of her person and estate. E. O. Warren and J. C. Warren being anxious that an allowance should be made to them for their own benefit, out of the income of the lunatic's property, and their sister consenting, it was referred to the Master to inquire whether, regard being had to the circumstances and estate of the lunatic, and to the comfort she was capable of receiving, and also the circumstances and situation of E. O. Warren and J. C. Warren, it would be proper that any, and if any, what sum of money should be allowed for the maintenance and support of the lunatic, in addition to the sum of 670*l.* per annum already allowed for that purpose.

The Master by his report, dated the 8th of May, 1835, found that, under a family settlement, E. O. Warren and J. C. Warren would, in the event of the lunatic's dying intestate, become entitled in equal shares to the lunatic's real estate, subject to the payment of an annuity of 400*l.* to their sister, and that they would also, under the same settlement, upon the death of the lunatic, become absolutely and equally entitled to all *her personal estate; he found, that although the commission was not issued till the year 1824, the lunatic had been of unsound mind since the year 1812, and that there was not any probability of her ever recovering the use of her reason, or becoming capable of managing herself or her estate; and that, in the month of June, 1835, she was visited, in the asylum in which she resided, by two physicians, in order to ascertain to what extent her comforts and enjoyments might be reasonably extended, and who reported that she was in good health, and that on their distinctly asking whether any thing could be done to increase her comforts, her reply was in the negative; and that during the inquiry, great pains had been taken that she should have an opportunity of giving a free and unbiassed reply, and that she was very well content to pursue the course of life she had

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so long followed; and they advised, rather that her present tranquil state should be undisturbed, than that new modes should be adopted, which, at all events, would be of trifling value, and might, in the issue, tend to disappointment. The report further stated, that evidence had been adduced before the Master, to shew that the income of E. O. Warren was only 300*l.* per annum or thereabouts, and was wholly insufficient for his support, having regard to his expectations in life; and to shew also that the income of J. C. Warren did not exceed the clear sum of 288*l.* per annum. The Master then certified that, having regard to the circumstances and situation of the lunatic, and the comfort she was capable of receiving, and also to the circumstances and situation of the said E. O. Warren and J. C. Warren respectively, he was of opinion that the sum of 900*l.* should be allowed for the maintenance and support of the lunatic, in addition to the sum of 670*l.* per annum already allowed for that purpose.

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A petition having been presented to confirm the Master's report, it was heard before the Lords Commissioners on the 13th of August, 1835, when their Lordships expressed disapprobation of the conclusion to which the Master had come, upon the circumstances stated in his report, and referred it back to the Master to review his report, so far as such report found that it would be proper that the additional allowance of 900*l.* should be made, with liberty to state special circumstances. The Master, by his further report, certified, that it appeared to him, by the before mentioned report of the physicians, that no further arrangements could be made for increasing the comfort of the lunatic, and that the allowance of 670*l.* per annum already made for her maintenance and support was sufficient for that purpose, and for providing all such comforts as the lunatic was capable of enjoying. The Master then certified, that it appeared to him that the income of E. O. Warren did not exceed 300*l.* per annum, and was wholly insufficient for his support, having regard to his expectations in life; and that the clear yearly income of J. C. Warren, who was a clergyman of the Church of England, did not exceed 288*l.* per annum; and he was of opinion, that the sum of 600*l.* per annum should be allowed for the maintenance and

support of the lunatic, in addition to the sum of 670*l.* per annum, already allowed for that purpose.

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A petition was now presented by E. O. Warren, praying that the Master's further report might be confirmed, and that, out of the additional sum of 600*l.*, 300*l.* might be retained by the plaintiff for his own use, and that the remaining 300*l.* might be paid to J. C. Warren.

The LORD CHANCELLOR said that he entertained great doubts with respect to the power of the Great Seal *to grant, and with respect to the propriety of granting allowances to relations of lunatics, for whom the lunatic was not legally bound to provide ; but his Lordship expressed an opinion that the Master had improved upon his former report, by recommending a smaller allowance. In *Ex parte Whitbread*, *In re Hinde* (1), in which his Lordship was counsel, he recollected that Lord ELDON felt very great difficulty in acceding to an application similar to the present ; the matter was several times mentioned to Lord ELDON, and he repeatedly answered, by asking what power he had to give away the property of a lunatic. Lord ELDON did, at last, accede to the prayer of the petition in that case, and the precedent which he had so made had been followed in several subsequent instances. The practice, however, was one which could not be regarded with too much caution, and the principle involved in it ought to be narrowed rather than extended in its operation ; and his Lordship desired that it might be understood, that he would never exercise such a jurisdiction without the greatest possible jealousy and caution. As, however, the principle had been so far followed, and as there seemed no probability that the lunatic would recover, or would be capable of greater enjoyments than those which were now afforded to her, his Lordship would, in the present instance, make the order.

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Mr. Wigram and *Mr. Richards*, for the petitioner.

Mr. Barber and *Mr. Phillimore*, for J. C. Warren.

(1) 16 B. R. 148 (2 Mer. 99).

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Mr. Dixon consented to the order, on behalf of *Mr. and Mrs. Morgell*.

The order * * directed that the whole allowance of 1,270*l.* per annum should be paid and applied, by the petitioner, in manner following: viz., the sum of 670*l.* for the maintenance and support of the lunatic, the sum of 300*l.* for his own better maintenance and support, and the sum of 300*l.* to *J. C. Warren* for his better maintenance and support.

1836.
Feb. 12.
April 13.

THE DUKE OF BEDFORD *v.* THE MARQUESS OF ABERCORN.

Lord
COTTENHAM,
L.C.
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(1 My. & Cr. 312—337; S. C. 5 L. J. (N. S.) Ch. 230.)

Articles, executed before a marriage, having stipulated that estates should be limited to the first and other sons of the marriage in tail, but it being proved that the intention was to limit the estates to the first and other sons in tail male, the Court, after the marriage had taken place, directed that, in the settlement to be executed in pursuance of the articles, limitations to the first and other sons in tail male should be inserted.

A power was reserved, in articles before marriage, to husband and wife, to alter and vary the provisions and terms of the articles, in such manner as to them should seem fit, previous to the execution of the settlement: Held, not to authorise the insertion in the settlement of a power enabling the husband to jointure a future wife, or to charge portions for younger children of a future marriage.

A stipulation was made in articles before marriage, that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually contained in marriage settlements made in England: Held, to authorise the insertion of a power of sale and exchange under which lands in England might be taken in exchange for lands in Ireland.

A reference was made to the Master to inquire whether certain proposed powers of leasing were usual in that part of Ireland in which the estates were situated, and whether any circumstances connected with the property rendered such powers expedient, and to the interest of all parties, with liberty to state special circumstances.

IN the month of October, 1832, a marriage had been agreed upon, and was about to be immediately solemnized, between *James Marquess of Abercorn*, and *Lady Louisa Jane Russell*, one of the daughters of *John Duke of Bedford*. All these parties

being in Scotland, and it being intended that the marriage should take place in that country, a contract of marriage, in the Scotch form, bearing date the 25th of October, was made between the Marquess of Abercorn of the one part, and Lady Louisa Jane Russell and the Duke of Bedford of the other part, by which the Marquess of Abercorn charged certain estates in Scotland with the payment, to Lady Louisa Jane Russell, of a certain annual sum for pin money, and with a gross sum of money, and a jointure, to be paid to her after his death; and with the payment also of certain sums, for the portions of the younger children of the intended marriage. The contract declared, however, that the Scotch estates should be relieved from the charges thus created, so soon as *those charges should have been effectually imposed upon the estates of the Marquess of Abercorn in the counties of Tyrone and Donegal in Ireland. Upon these terms, the Duke of Bedford bound himself, by the contract, to give a marriage portion of 12,000*l.* with his daughter.

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By articles of agreement, bearing even date with the marriage contract, and made between the Marquess of Abercorn of the first part, Lady Louisa Jane Russell of the second part, and the Duke of Bedford of the third part, reciting the contract of marriage, and reciting that the Marquess of Abercorn was tenant in fee tail of the said estates in the counties of Tyrone and Donegal in the kingdom of Ireland, by reason whereof no legal or effectual security could be made by him over and upon the same, until the said estates tail in the estates of the said Marquess of Abercorn should have been effectually barred, it was witnessed, that the Marquess of Abercorn did covenant with the Duke of Bedford, that he would forthwith execute a valid and sufficient settlement, charging his said estates in Ireland, or a sufficient part thereof, with the several charges mentioned in the contract of marriage: and further, that he, the Marquess of Abercorn, would, before the end of the then next Hilary Term, effectually bar all estates tail in the said estates in the counties of Tyrone and Donegal: and further, that the settlement to be made and executed in pursuance of those presents, should be made effectual to bar dower, and contain all the covenants, provisions, and conditions usually contained in marriage settlements made in England: and

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further, that the Marquess of Abercorn would, so soon as the estates tail in his said estates in Ireland should be effectually barred, limit and settle the said estates, by good and valid assurances in the law, to the use of himself for life, without impeachment of waste, with remainder to the first and other *sons of the intended marriage in tail; with remainder to the first and other sons of the Marquess, by any other marriage or marriages, in tail; with remainder to Lord Claud Hamilton, the only brother of the Marquess of Abercorn, for life, without impeachment of waste, but with power to charge the said estates with such jointure for any woman he might intermarry with, and such provision for his younger children, as he, Lord Claud Hamilton, might think fit; with remainder to the first and other sons of Lord Claud Hamilton, lawfully to be begotten, in tail; with remainder to the right heirs of the Marquess of Abercorn. The deed then contained a proviso, that so soon as a valid security and settlement, charging the estates in Ireland with the sums thereinbefore set forth, should have been made, the settlement and security charged and made upon the estates in Scotland should be void. And the Duke covenanted that, when the settlement and security over the estates in Ireland should have been duly made, the Duke would pay to the Marquess, the sum of 12,000*l.* as the portion of Lady Louisa Jane Russell. The deed then contained the following clause: "And it is hereby further declared and agreed upon, by and between the parties to these presents, that it shall be lawful to alter and vary the provisions and terms contained in the said contract of marriage, and in these presents, in such manner as to the said Marquess and the said Lady Louisa Jane Russell shall seem fit, previous to the execution of the said intended settlement, contracted by these presents to be made and charged upon the estates of the said Marquess, situate in the kingdom of Ireland as aforesaid."

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No other instrument, in the nature of a settlement or agreement for a settlement, was executed by the Marquess of Abercorn, before the solemnization of the marriage, which took place, in Scotland, on the day of the *date of the contract and articles, viz., the 25th of October, 1832.

The draft of a settlement was afterwards tendered to the Duke

of Bedford, which recited the contract of marriage, and the articles, and that recoveries of the Irish estates had been duly suffered in Hilary Term, 1838, and that it had seemed fit to the Marquess and Marchioness of Abercorn, that the provisions and terms contained in the contract of marriage, and in the articles, should be altered and varied in the manner in which the same were altered and varied by that draft, as the Marquess and Marchioness did thereby testify and declare. The draft then, after securing the intended pin money, proceeded to settle the Irish estates to the use of the Marquess of Abercorn for life, with remainder to trustees to preserve contingent remainders; with remainder, as to the Tyrone estates, to the use and intent that the Marchioness of Abercorn should receive a jointure of 5,000*l.* per annum; with remainder, as to all the Irish estates, to the use of the first and other sons of the marriage, in tail male; with remainder to the use of the first and other sons of the Marquess of Abercorn, by any future wife or wives, in tail male; with remainder to the use of Lord Claud Hamilton for life; with remainder to trustees to preserve contingent remainders; with remainder to the use of the first and other sons of Lord Claud Hamilton, in tail male; with remainder to the use of the Marquess of Abercorn, his heirs and assigns for ever.

Limitations of the Tyrone estates to trustees for terms of years, to secure the Marchioness's jointure, and the gross sum to be paid to her after the Marquess's decease, and to secure the portions of the younger children of the present marriage, were inserted immediately before *the limitations to the first and other sons of the present marriage.

The draft gave a power to the Marquess of Abercorn, at any time after the death of the present Marchioness, but without prejudice to the trusts of the term created for raising younger children's portions, to jointure any future wife to the extent of 4,000*l.* per annum, and a power to Lord Claud Hamilton to jointure any wife to the extent of 3,000*l.* per annum; it being provided, however, that the power given to Lord Claud Hamilton should be exercised after the death of the Marquess of Abercorn, and failure of the limitations, contained in the draft, to the sons of the Marquess successively in tail male, and without prejudice

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to the jointure of the present Marchioness, and the trusts of the term for raising portions for the younger children of the present marriage.

The draft also contained a power to the Marquess of Abercorn to charge sums for portions of younger children of any future marriage, to the extent of 70,000*l.*, but without prejudice to the trusts of the term created for raising portions for the younger children of the present marriage, or to the jointure of any future wife. A power was also given to Lord Claud Hamilton, at any time after the decease of the Marquess of Abercorn, and failure of the limitations thereinbefore contained to the sons of the Marquess successively in tail male, and without prejudice to the jointure of the present Marchioness and the trusts of the term for raising portions for younger children of the present marriage, and without prejudice to any jointures charged by the Marquess or Lord Claud under their powers for that purpose, to charge sums for portions of his (Lord Claud's) own younger children, to the extent of 50,000*l.*

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The draft contained a power to lease for any term absolute not exceeding thirty-one years, in possession, at a rack rent, without fine, and also a power to renew leases containing covenants for perpetual renewal ; a power to lease for one, two, or three lives, or for any number of years determinable upon the dropping of one, two, or three lives, such leases to be either in possession or reversion, so that there were not more than three lives in being at once, at rack rent, without fine ; a power to grant building or rebuilding leases for ninety-nine years, and repairing leases for thirty-one years, in possession, without fine ; and a power to grant mining leases for sixty years, in possession, or to take effect three years after date, without fine.

The draft also contained a power of sale and exchange ; and provided, that the lands taken in exchange, or purchased with the monies which should arise from sales, or which should be received for equality of exchange, might be situate either in Ireland, England, or Wales.

The Duke of Bedford, not approving of this draft, filed the present bill against the Marquess and Marchioness of Abercorn, Lord Claud Hamilton, and the two infant daughters of the

Marquess and Marchioness, who were the only issue of the marriage yet born.

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The bill stated, that the plaintiff had submitted the draft of the settlement to a conveyancing counsel of great experience, who advised him that he ought not to execute it without the sanction of the Court, inasmuch as the same was not in accordance with the contract of marriage and the marriage articles; first, because the estates were limited by the draft to the heirs male of the body of the Marquess, and not to the *heirs of his body; secondly, because the powers of sale and exchange, and the leasing powers, contained in the draft, were not warranted or authorised by the contract of marriage and the articles; and, thirdly, because the powers of jointuring and raising portions, by the draft expressed to be given to the Marquess and to Lord Claud Hamilton, were not in conformity with the powers in that behalf contained in the contract of marriage and the articles; and further, because the draft contained other matters not warranted or authorised by, or not in conformity with, the contract of marriage and the articles.

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The bill prayed, that the Marquess of Abercorn might be decreed to execute a valid and effectual settlement in accordance with, and in fulfilment of, the contract of marriage and the articles, the plaintiff undertaking thereupon to pay the said sum of 12,000*l.* with interest, to the Marquess, and in all other respects to perform his part of the agreement between himself and the Marquess; or that, if necessary, it might be referred to one of the Masters of the Court to settle and approve of such deed or deeds as might be necessary and proper for the purpose of carrying that agreement into effect, and that such deed or deeds might be executed by all necessary and proper parties.

The answer of the Marquess and Marchioness of Abercorn stated a deed poll, bearing date the 1st of July, 1835, by which, in execution of the power reserved to them in the concluding part of the marriage articles, they authorised and directed the insertion, in the proposed settlement, of such alterations of the terms of the articles, and of such additional provisions, as were respectively contained in the draft which had been tendered to the Duke of Bedford. The answer submitted, *that, under those circumstances, a settlement executed in conformity with the draft

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would be a due performance of the agreement contained in the contract of marriage and in the articles, and ought to be accepted as a satisfaction thereof. The answer also stated, that the limitations in the articles to the first and other sons of the Marquess of Abercorn, and of Lord Claud Hamilton, in tail, were inserted by mistake, instead of corresponding limitations in tail male; and it submitted, that such mistake ought, if necessary, to be rectified and corrected.

The answer of Lord Claud Hamilton stated, that he was willing that a settlement, in accordance with the draft which had been tendered, should be executed, in satisfaction of the contract and the articles; and particularly, that his own powers of jointuring and charging portions should be restricted, in the manner proposed in the draft.

[The original report set forth at length certain written evidence which in the opinion of the LORD CHANCELLOR sufficiently proved that the true intention of the articles was to limit the estates to the sons of the marriage in tail male and not in tail general.]

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Mr. Tinney, Mr. Wigram, and Mr. Loftus Wigram, for the Marquess and Marchioness of Abercorn :

The question which now arises is twofold ; first, whether the articles contain the true agreement for the settlement; and, secondly, if they do, whether they do not contain a power which will enable the Marquess and Marchioness to correct the settlement in the manner proposed by the draft which has been tendered. The evidence sufficiently shews, that the limitations to the first and other sons of the Marquess, and of Lord Claud Hamilton, were intended to be limitations in tail male.

* * * * *

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The power of alteration reserved to the Marquess and Marchioness, gives a discretionary power to be exercised, *bonâ fide*, in any manner not inconsistent with the essence of the settlement, and would authorise, not only the corrections of the mistakes and the omissions made in the articles, but also the insertion, in the settlement, of any provisions which would be advantageous to such a family as this. It is to be observed,

that the terms of the power require that the alterations should be made before the execution of the settlement.

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Mr. Kindersley, for Lord Claud Hamilton.

Mr. Heberden, for the infant daughters of the Marquess and Marchioness of Abercorn.

The *Solicitor-General* and *Mr. W. Russell*, for the Duke of Bedford :

* * The power of directing alterations must have been intended to relate to clauses for the management of the estates ; as powers of leasing, and so forth. It could not have been intended that the Marquess and Marchioness should be able, immediately after the marriage, to render ineffectual all the preparations and communications between different parties, which had previously taken place, upon the subject of the settlement. [330]

Mr. Tinney, in reply :

The principle upon which the Court corrects agreements, notwithstanding the Statute of Frauds, is, that, by means of the correction, the parties are restored to the state in which they were before the agreement was made. The Court cannot execute that which the parties never meant to execute. Unless the Court executes the real agreement, by modifying the articles, it can execute nothing. If the Duke of Bedford does not submit to have his bill dismissed, the case will be within the authority of *Ramsbottom v. Gosden*.

THE LORD CHANCELLOR [after stating the marriage contract, the articles, and the nature of the proposed alterations and the written evidence above referred to, said :] April 13.

There is, therefore, proof of the intention of the parties, and of the agreement between them, and of the instructions under which the draft of the agreement was prepared, all concurring in this, that the estates were to be limited to the sons of the marriage in tail male, and not in tail general. There are, therefore, ample materials by which the error in the articles [333]

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may be corrected, and the real intention and contract of the parties ascertained.

I have no hesitation, therefore, in directing that a settlement should be executed in conformity with such real intention and contract, and not according to those terms of the articles of the 25th of October, 1832, which are proved to have been introduced by mistake. * * *

The next question is, whether, in the settlement to be executed, there ought to be introduced a power for Lord Abercorn to charge the estates, for the purpose of jointuring any other wife, or of raising portions for the children of any other marriage. This proposition is not supported upon the ground of there having been any agreement for that purpose, or any mistake in the articles, in not providing for it; but it is contended, that Lord and Lady Abercorn have the power, under the articles, to direct these additional provisions to be made. The question, therefore, turns upon the degree of latitude to be given to the power, reserved in the articles, to make any alteration in the provisions and terms contained in the contract of marriage. The terms of that power are, "that it shall be lawful to alter and vary the provisions and terms contained in the said contract of marriage, and in these presents, in such manner as to the said Marquess, and the said Lady Louisa Jane Russell, shall seem fit, previous to the execution of the said intended settlement contracted by these presents to be made and charged upon the estates of the said Marquess, situate in the kingdom *of Ireland as aforesaid." The expression is not very correct, and not very intelligible; but there is sufficient in it to shew that the parties were not contemplating any alteration in the settlement of the estates; for the power to alter is confined to the intended settlement contracted to be made and charged upon the estates. Now, strictly speaking, I am not at liberty to look to see how that happened; when I see the draft, however, it is a fact very intelligible, because the draft, as originally prepared, contained no provision as to the settlement of the estates themselves, but contained provisions only as to the sums to be charged upon the estates; and there was then a power introduced which explains the expressions used: there was a power to alter or

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vary the settlement to be charged on the estates. It was afterwards made part of the agreement, that the estates themselves should be settled; but this power of alteration remained, and the terms and expressions of it were not altered.

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In the first place, therefore, I think it clear, on the face of the articles, without referring to Mr. Adam's evidence on the subject, that this power of altering did not relate to the mode in which the inheritance of the estates was to be settled, but to that which, by the articles, is called, the settlement to be charged upon the estates, meaning, the provision for the intended wife, and the younger children. The power, however, which it is proposed to introduce, would have the effect of materially affecting the right of the eldest son of the marriage, by letting in a jointure for another wife, and portions for children of another marriage. If the principle were admitted, that under this reservation, Lord and Lady Abercorn have the power of interfering with the estate and interest of the eldest son, what limit can be *placed to the exercise of such a power? It cannot be contended that this reservation gives them the power of altogether defeating the estate and interest of the eldest son; and if not, by what rule are they to be limited in the exercise of this power of postponing or diminishing that estate and interest? The only reasonable construction which can be put upon this reservation, is, that it refers only to the provisions intended to be made for the wife and children, by the articles, and that it was intended to give the power of varying and altering the terms and provisions of the charges created, as amongst those who were intended to benefit by them, and not to introduce new estates, charges, and interests, in favour of persons who are strangers to the agreement, and who are not in any manner alluded to in any part of it.

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I am, therefore, of opinion, that this power so reserved does not authorise the introduction, into the settlement, of the proposed provision for any other wife, or for the children of any other marriage.

The question, as to the leasing powers, must depend upon facts which are not before me in such a manner as to enable me to give any final direction; the articles containing no specific directions on the subject. The powers to be introduced must

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depend upon what powers are usual, or upon what powers any particular circumstances connected with the property may render expedient. Upon this subject, therefore, there must be a reference to the Master to inquire, whether the powers proposed to be introduced are usual powers in that part of Ireland in which the estates are situated, and whether there are any circumstances connected with the property which render it expedient, and for the interest of all *parties, that such powers should be introduced, with liberty to state special circumstances.

With respect to the question, whether the power of sale and exchange should be confined to Ireland, or whether it should be extended to lands in England, there is nothing to lead me at all, for nothing about it is expressed in the agreement; the question is left entirely open. I can see no good reason for confining the power to lands in Ireland: and I can see nothing in the contract between the parties to make it necessary to confine that power to Ireland.

I think, therefore, that it may be very well extended to England; and that, on the subject of the leases, there must be the reference which I have mentioned.

The proposed restriction of Lord Claud Hamilton's power of jointuring, and of providing portions for younger children, to which he consents, will be for the benefit of the estates.

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July 16, 20.Lord
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[391]

(6 Simons, 54—67; reversed on appeal, 1 My. & Cr. 391—393.)

A testatrix devised all her messuages, situate in Denmark Court. She had five houses within the court, and another which fronted towards the Strand, and formed one side of a covered passage leading to the place where the five stood, and to the back of which was attached an out-building, abutting on ground within the court. The VICE-CHANCELLOR having decided that the five houses only passed, the LORD CHANCELLOR, on appeal, directed an ejectment to be brought by the heir-at-law against the devisee, and on a verdict being found for the defendant, reversed the decision of the Court below, and made a declaration, that the house fronting towards the Strand passed with the other five.

[6 Sim. 54]

KITTY LEVY NEWTON, by her will dated the 12th of August, 1823, devised, to trustees, all those her freehold messuages, lands,

tenements and hereditaments, situate and being in Denmark Court, Haydon Square, Hennage Lane, and Booker's Gardens, to hold to them, their heirs and assigns, upon trust, out of the rents, to pay certain annuities, and, subject thereto, to hold the said messuages, lands, tenements and hereditaments in Denmark Court and Haydon Square, upon the trusts therein mentioned.

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The testatrix was seised of five freehold houses, numbered 15, 18, 19, 21 and 22, which were admitted to be situate in Denmark Court. She was also seised of another freehold house, numbered 383, situate in, and fronting towards, and having its principal entrance on the north side of the Strand, and having adjoining to it, at the back, an outbuilding, of much lower elevation than the house, and appearing to have been built after it. This outbuilding was used as a bakehouse, and one end of it abutted on ground admitted to be in Denmark Court. A narrow way or passage, which appeared to have been made through the ground floors of the house numbered 383 and the adjoining house numbered 382 in the Strand, and which was covered by parts of the first floors of those two houses, led, northwards, from the Strand to the place in which the five houses were situate, and was much narrower than that place. The house numbered 383, had a side door *(which was not numbered) opening into the passage; and the words, "Denmark Court" were painted on the walls or door-posts of the houses numbered 382 and 383, at the entrance of the passage nearest the Strand, (and also [were alleged to be painted] on the house numbered 21, which was next beyond the bakehouse) (1).

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All the houses admitted to be in Denmark Court, were uniform in structure; but differed, in that respect, from the house numbered 383, and were greatly inferior to it in elevation and size.

The houses numbered 382 and 383, and those to which the passage led, had all formerly been one entire estate; and numbers 382 and 383 were described in the title-deeds and leases, and in the assessments to the land-tax and poors'-rates, as

(1) At the subsequent trial of this case before a jury the evidence upon this point was not satisfactory, and this statement must be taken to have been unproved.—O. A. S.

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situate in the Strand, and the others, as situate in Denmark Court.

The estate afterwards became joint property, and the proprietors having agreed to make partition, number 383, which was described, in the award, as situate in the Strand, and numbers 15, 18, 19, 21 and 22, as in Denmark Court, were allotted to the person under whom the testatrix claimed; and number 382, which was described as in the Strand, and the rest of the houses, which were described as in Denmark Court, were allotted to the other joint proprietor. The letters to and from the occupiers of number 383, were directed to and dated from the Strand, and they were described, in deeds and in their cards of address, as being resident there.

[*56] The only instance in which number 383 was differently described, was in an agreement which the testatrix *entered into, in 1825, to grant a lease of that house to W. Ward, in which it was described as situate in Denmark Court Passage, but Ward, who was then in the occupation of the house, was described, in the agreement, as of the Strand.

The plaintiff's witnesses represented Denmark Court as consisting of the passage as well as the place into which it opened on the north; and one of them said that all the six houses were known to the testatrix as, and called by her, "her Denmark Court houses:" but, in a map or plan, which they said was a correct map or plan of Denmark Court and the houses, streets and places adjacent thereto, the house numbered 382 was omitted.

The defendant's witnesses described Denmark Court as consisting only of the place into which the north end of the passage opened.

1836.

[1 My. & Cr.
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Some time after the death of the testatrix, but prior to the institution of the suit, the whole of the testatrix's Denmark Court estate, including the house fronting towards the Strand, was sold and conveyed by the trustees under her will to the Commissioners of his Majesty's Woods and Forests, by whom the buildings standing upon it were pulled down, to make way for the improvements then projected in the neighbourhood of Exeter Change. The purchase money was paid into the Court.

of Exchequer, under the provisions of the 7 Geo. IV. c. 77, s. 22, and laid out in 3*l.* per cents.; and the contest between the parties in the cause related to that portion of the stock which represented the price paid for the house numbered 383 in the Strand; the devisees claiming it on the ground that the house had passed under the will, and the heir-at-law, on the other hand, insisting, that to that extent the testatrix had died intestate.

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His Honour having decided that the house numbered 383 in the Strand, with the bakehouse and appurtenances, did not pass by the will of the testatrix under the description of her freehold messuages situate in Denmark Court, the plaintiffs, who were the parties beneficially interested in the produce of the devised estates, appealed from that decision.

The case was argued by the *Solicitor-General* and *Mr. Girdlestone, jun.*, in support of the appeal, and by *Mr. Jacob*, for the heir-at-law.

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The LORD CHANCELLOR, in the course of *Mr. Jacob's* argument, expressed a strong opinion, that, as the decision of the question under appeal depended in a great measure on the admissibility of certain evidence which was offered for the purpose of aiding the construction of the will, or explaining its language, and upon the weight to be given to that evidence, if admitted, it would be much more satisfactory to refer the case to the determination of a court of law.

After some further discussion, his Lordship's suggestion was acquiesced in, and an order was finally arranged, by which it was directed that the appeal should stand over, and that an action of ejectment should be brought in the Court of Exchequer on the demise of Montague Gabriel Newton, the heir-at-law of the testatrix, against Alexander Levi Newton, one of the appellants, the defendant undertaking not to set up any legal objection to the title of the plaintiff at law.

The action was accordingly brought, and came on to be tried on the 21st of June last, before Lord Abinger *and a special jury, and evidence was gone into at considerable length on both sides. It was proved at the trial that the words "Denmark

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Court" were painted in the Strand on the outside and over the top of the passage leading from that street into Denmark Court, and also on each side of the passage in the inside; but the heir-at-law altogether failed in proving, as was alleged to have been proved in the Chancery suit, that those words had been painted on the house numbered 21 within the court, being the first house beyond the passage. The testimony as to reputation was somewhat conflicting, but, in the opinion of Lord ABINGER, the preponderance was, upon the whole, in favour of the defendant. The jury found a verdict for the defendant; thereby, in effect, deciding that the house in question passed by the will under the description of a messuage situate in Denmark Court.

July 16.

The appeal being now brought on again, the LORD CHANCELLOR reversed the VICE-CHANCELLOR's decision, and made a declaration in accordance with the finding of the jury.

July 20.

Upon the question of costs, the LORD CHANCELLOR said that, as the heir-at-law had raised a contest upon circumstances which were entirely *dehors* the will, and had failed in that contest, and as he had moreover altogether failed in proving a material fact, upon which great stress had been laid in the Court below, and but for which probably his Lordship would not have thought it necessary to send the case to law at all, he was of opinion that so much of the costs of the appeal as were occasioned by the trial of the action, should be borne by the heir-at-law.

1836.
April 18, 20.

Lord
COTTENHAM,
L.C.
[401]

WOODS v. WOODS (1).

(1 My. & Cr. 401—410.)

A testator devised certain estates by name, together with his farming stock and furniture, to his beloved wife, to sell, to discharge all his creditors; and he constituted his wife and T. W. his executors, whom he appointed to sell and dispose of all his estates and chattels, in such manner as they should jointly agree upon, or not to sell if it seemed

(1) But whether the words here used would now be treated as creating a trust enforceable in equity is a doubtful question. See *Lambe v. Eames* (1871) L. R. 6 Ch. 597, 40 L. J. Ch. 447, 25 L. T. 175, where the Court, without actually deciding the point, intimated that there would be great difficulty in defining and enforcing the obligations of the supposed trustee.—O. A. S.

most advisable to keep them, or in any way they should think proper, so that every creditor had his money, and if sold, all overplus to his wife, towards her support and her family: Held, upon demurrer, that the testator's children had such an interest in the devised estates as enabled them to sustain a bill against the widow and her co-executor, impeaching a sale on the ground of fraud, and praying an account of the rents and profits.

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v.
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ROBERT WOODS, a farmer, who had some time previously been a bankrupt, and had obtained his certificate, made his will, which bore date the 4th of July, 1786, and was executed and attested in manner required for passing freehold estates by devise. The will, which was drawn by the testator himself, and was so strangely spelt and expressed as in some places to be hardly intelligible, after purporting to give to the testator's wife, Elizabeth, certain property described as her own estate, and as to which no question arose, continued as follows :

"I give likewise all and every part of my estate at Blundeston, Corton, Flixon, Gorlston, and any other towns adjoining, and all farming stock, crop of corn, hay, household furniture, and every other thing whatsoever it be, to my well beloved wife Elizabeth, to sell, to discharge all my creditors, where the money is borrowed *by bonds, notes, or mortgage, since my certificate, and used for my estate, for farming or any other thing whatsoever for my use, if my brother Thomas is bound with me or not bound with me, all to be allowed and paid out of my estate. Also I do constitute and make Elizabeth my wife, and Thomas Woods of Willingham, my executors, whom I do appoint to sell and dispose of all my estates and chattels, in such manner and form as they shall jointly agree upon; or not to sell, if it seems most advisable to keep them, or in any way that they shall think proper, so that every creditor have his money; and if sold, all overflush to my wife, towards her support and her family, if any there be, after paying my brother for his trouble and all other debts whatsoever."

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Elizabeth Woods, the testator's wife, was under her marriage settlement, entitled in remainder upon her husband's death, to a life interest in some portion of the real estates comprised in this devise.

The testator died in the month of February, 1789, leaving

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Elizabeth Woods, his widow, and Thomas Woods the younger, his son and heir-at-law, of the age of four years, and also two infant daughters, his only children, surviving him. The will was duly proved by the executrix and executor, Elizabeth Woods and Thomas Woods, who was the testator's brother. Elizabeth Woods afterwards married a person of the name of Hulme, who died in the year 1834.

The bill was filed in the month of October, 1835, by the testator's son and daughters, one of whom was a married woman, and whose husband was a co-plaintiff in the suit, against Thomas Woods and Elizabeth Hulme, the executor and executrix of the will.

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After setting out the material part of the will, and stating the facts above mentioned, the bill went on to allege, that the defendant, Thomas Woods, was the sole acting executor and trustee under the will; and that, immediately upon the testator's death, he had entered into and that he still retained exclusive possession of the messuages, farms, and lands in the will mentioned, and had alone received the rents and profits thereof, and had sold and received the proceeds of the furniture, and other personal property and effects, and had also called in the testator's debts, without any interference on the part of his co-executrix; and that by the means aforesaid he had realised a considerable sum of money, which he had mixed with his own monies. The bill then charged, that the messuages, farms, and lands comprised in the will were not, at any time after the decease of the testator, put up to sale; but that the defendant, Thomas Woods, having so entered into possession, had ever since continued, and now was in the possession or receipt of the rents and profits of such messuages, farms, and lands, and that he now claimed to be entitled to hold and retain the same as absolute owner, by virtue of some alleged sale and conveyance made to him by his co-executrix the defendant, Elizabeth Hulme. The plaintiffs, however, submitted that, according to the true construction of the will, no exclusive power of sale was vested in Elizabeth Hulme alone, but that Elizabeth Hulme and Thomas Woods were thereby constituted joint trustees, with a joint power of sale; so that Woods, as such trustee, could not lawfully become

a purchaser of such estates ; and they further submitted, that, for these reasons, such alleged sale was wholly void, and that the possession of the estates by Woods was and must be considered as a possession taken under the will, in the character of trustee and executor only, and subject to a sale thereof being made in case that should *appear expedient, and until such sale, subject to the payment of the testator's debts, with the arrears of interest, out of the accruing rents and profits, and after satisfaction of the testator's debts, subject to the trusts of the will, for the benefit of the defendant Elizabeth, and the plaintiffs, according to their respective rights and interests therein.

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The bill * * prayed that the sale and conveyance by the widow to the defendant Thomas Woods might be set aside as fraudulent and void, and that the rights of the plaintiffs might be declared, and that all necessary accounts might be taken.

To this bill a general demurrer, put in by the defendant Thomas Woods, was overruled by the VICE-CHANCELLOR, and the defendant thereupon appealed.

Mr. Wigram and Mr. Koe, in support of the demurrer :

One question which arises upon the first passage in the will is, whether the devise of these estates to the testator's beloved wife Elizabeth to sell is necessarily a simple trust, or whether it is not rather to be intended as a gift which she was to take for her own benefit, subject to the charge, within the principle of *King v. Denison* (1). * * Thomas Woods, the testator's brother, is not a trustee, but he is named an executor, and his sanction and concurrence are required in order to justify the widow in resorting to or abstaining from a sale ; his authority being interposed for the protection and security of the creditors, of whom he was himself one. * * If for any reason the lands were not to be sold,—in the event, for instance, of the widow taking upon herself the payment of debts, as she might well have done,—she was to hold the lands discharged of the burthen and for her own benefit. * * *

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Besides, it is well settled that a legacy to a parent for the

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maintenance of a child is a good gift to the parent; so that if the child dies the parent will nevertheless be entitled to the legacy: *Hammond v. Neame* (1); *Robinson v. Tickell* (2); and the words here are stronger in favour of the mother's right, the gift being to her expressly towards her own support, as well as that of the family. The son came of age in the year 1806; his eldest sister, one of the co-plaintiffs, attained twenty-one in the year 1801; and no satisfactory reason is assigned for the extraordinary delay in the assertion of this claim.

Sir W. Horne and Mr. O. Anderdon, contra:

This is not a devise for the benefit of Elizabeth Woods, who on the face of the will is stated to take the property upon trust. She and the testator's brother, to whom jointly the authority to sell is delegated, upon the first part of the will are mere trustees.

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* * The children, under the terms of this bequest, have a substantial interest in the surplus proceeds. The gift of the overplus is to the widow, towards the support of herself and her family; and if the land had not been sold, it would remain subject to a charge for their joint benefit. * * *

Mr. Wigram, in reply.

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THE LORD CHANCELLOR [after shortly stating the substance of the bill, and reading the material part of the will:]

Here then is a gift of the real and personal estate, upon trust to sell to pay debts, a trust not depending upon the executors themselves. The testator, indeed, gives them the discretion to sell or not to sell, as most advisable, so that every creditor has his money, and that clause would interpose a discretion to mortgage as well as to sell, for the purpose of paying debts, but the debts were to be paid at all events; "and then," proceeds the will, "if sold, the overflush to my wife and family."

One point raised upon the will itself was, that if there be a trust at all, it is a trust only for the eldest son. Now the word "family" is capable of various significations, according to the context. It is obvious that in this passage the testator was dealing with the surplus of the purchase money after a sale;

(1) 18 R. R. 15 (1 Swanst. 35).

(2) 7 R. R. 5 (8 Ves. 142).

and the construction contended for in support of the demurrer would be, that, after a sale had taken place, although there was a trust for the family, the heir was the only person entitled to receive any benefit from it. The testator, however, was manifestly dealing with the property in contemplation of a certain event, the event, namely, of a sale. I think it is clear, therefore, that, in the construction of this will, the expression "family" cannot be confined to the heir, but that the other children must be considered as also objects of the testator's bounty.

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It is equally clear, that if the contemplated event took place, a trust, as between the widow and the children, would be created. The cases which were cited in support of the demurrer have no application to this *point. They only decide, that where a gift is made to a person, and a trust created in that person, the Court may safely and properly pay over the fund to the individual who is such trustee; but they are far from deciding that the person to whom the payment is so made in that character, shall not be accountable for the fund to those for whose benefit the trust is created.

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It has been contended also, that upon the case stated in the bill, of no sale or no valid sale having been made, there is no equity or beneficial interest in the younger children. In order to lay a foundation for that argument, it must appear that the younger children can, by no possibility, have any interest in the fund; for if they have any interest in the fund, they would have a right to such an account as is sought by the present suit. Now I have already stated it to be my clear opinion, that in a certain event, the event, namely, of a sale, the widow would take the property, subject to a trust; and that that trust would be not only for the eldest son, but also for the other members of the family.

It remains only to be considered, therefore, whether the plaintiffs so state their case that the contingency referred to may arise, and I am of opinion that they do. So far, indeed, from treating the property as now discharged from the debts, the bill distinctly represents it as still liable to the burthen; for, instead of alleging that the debts have been paid, it seems, on the contrary, to assume that there were charges remaining outstanding

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and unpaid. If that be so, the devised estates are still bound to satisfy those charges. If the widow had no absolute right, the other defendant can have no right to the property; and nothing which may have passed between himself and his co-trustee can affect the rights of those claiming beneficially under the trust.

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*The allegation with respect to the existence of debts amounts to this,—that the debts were paid personally by the defendant Woods, thus bringing the case within this state of circumstances,—that there were debts to be paid and trusts to be executed—that there existed a necessity for raising money, or converting the estate into money. The representation in the bill is, in effect, equivalent to a direct statement that there was a necessity for a sale; and assuming that there was such necessity, it is impossible to say that the discretion vested in the trustees as to the mode of raising the money would have the effect of altering or affecting the rights of the parties.

I avoid expressing an opinion as to any state of circumstances other than that which appears upon the face of the bill. I am of opinion that the bill does shew such a state of circumstances that the event might arise in which a sale would necessarily take place; and that in that state of circumstances there is an interest in the plaintiffs entitling them to ask for the account which the bill prays.

I cannot think that the lapse of time has any effect in barring their claim; for the life interest vested in the widow continued, and still continues, to subsist as to part of the property devised; and the bill alleges that the plaintiffs were induced to believe, from the circumstances therein stated, that they had not any right to institute proceedings during her lifetime. I am of opinion, therefore, that the VICE-CHANCELLOR's order was right, and that the appeal must be

Dismissed with costs.

LOCKE v. SOUTHWOOD.

(1 My. & Cr. 411—422; affirmed sub nom. *Bush v. Locke*, 3 Cl. & Fin. 721—735; S. C. 9 Bligh (N. S.) 1.)

On the marriage of a settlor, who afterwards predeceased his wife, copyholds were settled with an ultimate limitation in default of issue living at the death of the survivor of the husband and wife to the use of the right heirs of the settlor: Held, that the limitation took effect in favour of the person who would have been the testator's heir if he had survived his wife, who was his customary heir according to the custom of the manor.

By articles bearing date the 24th of April, 1769, and made between Robert Marke, of the first part, Grace Haddon, spinster, of the second part, and John Haddon and John Marke (brother of the said Robert Marke), as trustees, of the third part, reciting, that a marriage was soon to be solemnized between the said Robert Marke and Grace Haddon, and that the said Robert Marke was then lawfully seised to him and his heirs and assigns for ever, according to the custom of the manor of Taunton Deane, [of certain premises therein particularly described, which were parcel of the customary lands of inheritance of Taunton Deane aforesaid, it was declared that, in consideration of the said intended marriage, the said Robert Marke covenanted to convey and assure to the use of the said trustees, or their heirs and assigns for ever, according to the custom of the said manor, all the said premises upon trust, to permit the said Robert Marke, his heirs and assigns, to enjoy the said premises until the said marriage; and after the solemnization thereof, to permit him and his assigns to receive the rents and profits thereof for his life, he rendering therefore all rents and services due and payable in respect of the premises during the said term; and upon further trust, after his decease, to permit the said Grace Haddon and her assigns to receive the rents and profits thereof for her life,] in case she should survive her said intended *husband, and in full recompense of all dower and thirds which she might otherwise have, claim, or challenge in or out of any of the freehold lands, tenements, or hereditaments of the said Robert Marke, she rendering therefore all rents [and services due and] payable in respect of the premises aforesaid during the said term; and upon this further trust, that upon and after the death of the survivor

1829.

*June 30.*SHADWELL,
V.-C.

On Appeal.

1831.

*June 16, 20.*Lord
BROUGHAM,
L.C.*Appeal to
House of
Lords.*

1834.

*June 25.
July 4.*

1835.

*Sept. 5.*LORD
BROUGHAM,
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of them the said Robert and Grace, the said trustees, should surrender into the hands of the lord of the said manor for the time being the [said premises] to the use and behoof of such children of the marriage, for such estates, and in such manner and form as the said Robert, or in his default the said Grace, should by deed or will appoint; and in default of such appointment then, upon trust, to surrender the said [premises] to the use of all and every the child and children of the body of the said Robert on the body of the said Grace lawfully begotten, their heirs and assigns for ever, according to the custom of the manor aforesaid, as tenants in common, and if but one such child, then to the use of such only child, his or her heirs and assigns for ever, according to the custom of the said manor; such surrenders to be made at the costs and charges of such child or children who should be entitled to take the same by virtue thereof; and in default of issue of the said Robert on the body of the said Grace, that should be living at the death of the survivor of them, then upon this special trust and confidence, that the said trustees should surrender into the hands of the lord of the manor aforesaid for the time being all and singular the said [premises] to the use and behoof of the right heirs of the said Robert Marke for ever, according to the custom of the said manor, such surrender or surrenders last mentioned, to be made at the costs and charges

[*414] in all things of such person or persons *who, by virtue of the last-mentioned condition or limitation, should be entitled to take the same.

On the 26th of April, 1769, a surrender, upon the conditions and uses expressed in the marriage articles, was made to the use of the trustees, who were thereupon duly admitted by the lord as tenants of the customary estates comprised in the articles; and the marriage between Robert Marke and Grace Haddon shortly afterwards took effect. They had issue, one child only, a daughter named Elizabeth Marke. Robert Marke the settlor died in the year 1779, without having made any valid appointment under the articles, leaving his daughter Elizabeth, and widow Grace, surviving him. After his death the widow intermarried with one James Turner, who survived her, and by whom she left two sons, John Haddon Turner and James Turner the

younger. Grace Turner continued under the settlement to hold and enjoy the customary estates down to the period of her death, which took place on the 5th of February, 1819. Elizabeth Marke, the daughter, died in the year 1812, without having ever been married.

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The bill was filed by Susannah Locke, the youngest sister of Robert Marke the settlor, against Thomas Southwood, who had purchased, for valuable consideration, but with notice of the settlement, certain portions of the property comprised in the marriage articles, and who was also the lord of the manor of Taunton Deane.

The bill, after setting forth the marriage articles, and stating the facts already mentioned, went on to allege that the settlor left no issue except Elizabeth Marke, and that he left no brother surviving him; and that the plaintiff was his youngest sister, and that, as such youngest sister, she became and was at the time of the *death of Grace Marke (afterwards Grace Turner), and was now the heiress of Robert Marke, according to the custom of the manor; and that, as such customary heiress, she, upon the death of Grace Marke, became and was entitled to the customary premises, under and by virtue of the trusts expressed in the articles. The bill then stated that the legal estate in the premises had, by virtue of certain mesne surrenders and admittances, become and was now vested in the defendant. The bill charged that, according to the true construction of the marriage articles, the customary premises were, upon the death of the survivor of Robert Marke and Grace his wife, without leaving issue of their marriage then living, to be surrendered to the use of the person or persons who should then be the customary heir or heirs of Robert Marke. The bill prayed a declaration, that the plaintiff was entitled in equity to the customary premises, and that the defendant might be decreed to surrender the same to her and her heirs and assigns.

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The answer of the defendant, after admitting the marriage articles and the other matters of fact stated in the bill, proceeded to set forth the nature of the defendant's title, which he derived under surrenders made to him by the person in whom the legal estate had become vested, with the concurrence of the customary

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heir of Grace Turner, and of the devisee under the will of Elizabeth Marke. The answer went on to admit, that according to the defendant's belief, Robert Marke left no brother surviving him, and that the plaintiff was his youngest sister; it also admitted, that as such youngest sister, she became and was at the time of the death of Grace Marke, heiress of Robert Marke, according to the custom of the manor; but it alleged that, by the custom of the manor, the widow of a tenant *dying seised of customary lands, parcel of the manor, was heir of such lands to her and her heirs absolutely, and that Grace Marke was therefore, at the time of the death of Robert Marke, his heiress according to the custom of the manor; and the defendant, for the reasons aforesaid, denied that the plaintiff, as such customary heiress, did, upon the death of Grace Marke, become or was now entitled to the customary premises. The defendant admitted, that the legal estate in the customary premises was then vested in him, and that he was also the lord of the manor; and he submitted that he was not a trustee of the legal estate of the premises upon the trusts of the marriage articles; and that the premises were not, according to the true construction of the articles, upon the death of the survivor of Robert Marke and Grace his wife, without leaving issue of the marriage then living, to be surrendered to the person or persons who should then be customary heir or heirs of the said Robert Marke, as in the bill alleged.

The plaintiff filed a replication to the answer, but did not examine any witnesses, or adduce any other evidence in support of the bill. Copies of the various surrenders and admittances on which the defendant relied were admitted by the plaintiff.

The VICE-CHANCELLOR, at the hearing of the cause, made a decree according to the prayer of the bill, and the defendant thereupon presented a petition of appeal.

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Sir Edward Sugden and *Mr. Jacob*, for the plaintiff * * submitted that the party who was to take the property under the ultimate limitation, was the individual who happened to fill the character of customary heir of the settlor at the determination of the contingency previously expressed; that is to say, in the

events which had happened, on the death of the widow of the settlor leaving no issue of the marriage. * * *Ward v. Southwood*.
Bradley (1). LOOKER
v.
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The *Solicitor-General* (Sir W. Horne), Mr. Treslove, and Mr. Preston, in support of the appeal :

The ultimate limitation in the marriage articles, in default of issue of the body of Robert Marke, the settlor, on the body of Grace Haddon, living at the death of the survivor of them the said Robert and Grace, to the *use of the right heirs of the said Robert Marke for ever, according to the custom of the manor, is no more than a reservation of the settlor's old estate, revesting that estate in him, subject to the previous limitations ; and upon his death, the estate descended to, and vested in, his widow, who survived him, as his heir according to the custom. * * A limitation to the right heirs of the grantor continues in himself as the reversion in fee : *Fenwick v. Mitforth* (2), *Earl of Bedford's* case (3). * * *

It is absurd to suppose that the settlor could have meant to make such a settlement of his own estate, that, if his wife died the very day after the marriage, his interest should be irrevocably cut down to a mere life estate, especially in favour of a person uncertain and undefinable during his lifetime, and from whom no consideration moved either directly or indirectly. That it was not intended to provide by these articles for any person or object unconnected with the marriage, is manifest from the very first trust expressed in them,—the trust by which the settlor, his heirs and assigns, are permitted to hold and enjoy the premises, until the marriage takes effect. * * *

Doubtless, a limitation to right heirs may be construed to mean right heirs at a particular time, as was the case in *Cholmondeley v. Clinton* (4), where the sense of the context rendered such a construction imperative ; but, even in a will, nothing but the strongest and most distinct expressions have been considered sufficient for that purpose : *Holloway v. Holloway* (5).

(1) 2 Vern. 23.

(2) Mod. 284.

(3) Mod. 718.

(4) 22 R. R. 84 (2 Jac. & W. 1).

(5) 5 R. R. 81 (5 Ves. 399).

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Sir Edward Sugden, in reply, referred to *Goring v. Nash* (1) and *Clavering v. Clavering* (2), to shew that the Court would give effect to marriage articles beyond the immediate purpose for which they were entered into, and for the benefit of volunteers ; and he submitted that *Cholmondeley v. Clinton*, so far from being adverse, was in the plaintiff's favour.

June 20.

LORD CHANCELLOR BROUGHAM :

This is a very singular case, arising out of a custom in the manor of Taunton Deane, by which a widow succeeds as heir to her husband, to the exclusion of the issue. Such being the custom of this manor, a plaintiff comes forward, who is the youngest sister of the deceased husband, and who became his customary heiress at the death of the widow (for a custom similar to the tenure by borough English also obtains in this manor), and who, as such heiress, claims certain customary estates within the manor, under the limitations of the settlement which I am about to state. The other party to the suit is a purchaser for valuable consideration, with notice, who claims under the widow and daughter of the settlor. The settlement gives an ultimate remainder in the equitable, not in the legal estate, to the right heirs of the settlor, who was a person of the name of Robert Marke ; and the question is, whether the right heirs to whom this remainder is limited are the right heirs of the settlor at his death, or his right heirs at the time of the happening of the contingency upon which this limitation is to take effect ; in other words, whether the widow or the youngest sister of the settlor is entitled under this ultimate limitation.

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Every thing depends, therefore, upon the ultimate limitation, which is to this effect : The settlor, first of all, for the better support and maintenance of his intended wife Grace, and in full satisfaction and bar of all dower and thirds, limits the estates in question to the use of himself and the said Grace for life, and after the death of the survivor of them, to the use of their issue ; and, in default of issue of the body of the said Robert Marke on the body of the said Grace Haddon lawfully to be begotten, that

should be living at the time of the death of the survivor of them, upon this further special trust, that the trustees, or the survivor of them, should surrender the said estates into the hands of the lord of the manor, to the use and behoof of the right heirs of the said Robert Marke, according to the custom of the manor ; “ such surrender or surrenders last mentioned to be made at the costs and charges in all things of such person or persons, who, by virtue of the last mentioned condition or limitation, should be entitled to take the same.”

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Now it is to be particularly observed, that in this case a surrender is directed to be made in favour of the issue at the time of the death of the survivor of the parents ; and in default of issue which shall be living at the time of the death of the surviving parent, a surrender is directed to be made to the right heirs of the settlor according to the custom of the manor ; such surrender to be made at the costs and charges in all things of the person or persons who shall be entitled under the ultimate limitation. In this limitation it seems to me to be perfectly clear, that the intention of the settlor was, that the estate should go to him or her who should answer the description of his right heir according to the custom of the manor at a given period, namely, *the death of Grace without issue of the marriage living at the time of such death. [*422]

Considering the plain indication of the settlor's intention, arising from the circumstance of his giving a life-estate to his wife, of his making a provision for her in bar of all dower,—tying himself up, therefore, from the power of making any future settlement of the property ; considering, further, that it was not very likely that he contemplated the event of his wife succeeding to this estate as his customary heir, while it was obviously his intention that the ultimate limitation should take effect in the event of a failure of issue of their bodies ; I am, upon these grounds, of opinion that the decision of the VICE-CHANCELLOR is correct, and ought to be affirmed.

This cause, under the name of *Bush v. Locke*, was afterwards heard on appeal in the House of Lords, by the LORD CHANCELLOR and by Lord WYNFORD (as reported in 3 Cl. & Fin. 721), on the

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25th of June and 4th of July, 1834. At the conclusion of the argument, Lord WYNFORD stated that he had not formed any decided opinion on the case, and at his request the case was adjourned. When the case came on again, on the 5th of September, 1835, LORD BROUGHAM, in the absence of Lord WYNFORD, affirmed his own decree, saying:

1835.
[3 Cl. & Fin.
734]
[*735]

The case appeared to me, even if it were *heard on the point of law said to be involved in it, not to admit of any reasonable doubt. I have carefully considered the case. I considered it at the time of the argument, and I concurred in advising your Lordships to postpone your judgment in consequence of the doubt then entertained by my noble and learned friend Lord WYNFORD. It has stood over a whole session, and it is hardly fair to the parties interested in the judgment to put it off longer. From the state of health of my noble and learned friend, it is all but certain that he cannot attend here during this session, and it is very doubtful, for the same reason, whether he will be able to attend next session. Under these circumstances, and having no doubt on my own mind of the correctness of the decision appealed from, I think I should not discharge my duty if I did not now advise your Lordships to affirm that decision; but I do not advise your Lordships to give the respondent any costs, because my noble and learned friend expressed a doubt whether it was not a case fit for the opinion of the Judges.

Ordered accordingly, that the judgment complained of be affirmed, without costs (1).

(1) See the following case.

LOCKE v. COLMAN.

(1 My. & Cr. 423—433; further proceedings, 2 My. & Cr. 42, 635.)

A custom in a manor, that on the death of a person seised of property within the manor, leaving no widow, child, or brother, the youngest sister shall inherit, will not be held to exclude the issue of a deceased brother, unless the custom is expressly proved to extend to that particular case.

An issue directed for the purpose of trying the custom.

THIS was a bill filed by Susannah Locke, the plaintiff in the cause of *Locke v. Southwood* (1), for the purpose of recovering from Matthew Colman and Sarah Colman certain other portions of the customary premises situate within the manor of Taunton Deane, and comprised in the same marriage articles. The Colmans stood in the same situation with Southwood, being purchasers for valuable consideration, who derived title under surrenders made by the person in whom the legal estate was vested, with the concurrence of the customary heir of Grace Turner, the settlor's widow, and of the devisee under the will of Elizabeth Marke, his daughter.

The case made by the bill was, *mutatis mutandis*, the same in substance as that in the suit of *Locke v. Southwood*. The custom of the manor, as to inheritance, was stated to be, that upon the death of a person seised in fee according to the custom, and leaving no wife or children and no brother surviving him, the customary estates descended upon his youngest sister, and the plaintiff was alleged to be such youngest sister.

The answers of the defendants * * stated that the defendant was informed that Robert Marke had a brother John Marke, who died leaving issue two sons, John and Robert, the youngest of whom, Robert, would, in the event of Robert Marke the settlor not having left a widow, have been his customary heir; and that Robert Marke, the son of John, left John his youngest *son, who would now be the heir of Robert Marke the settlor if he had not left a widow; and the defendant said he was advised and believed that, for the reasons aforesaid, the plaintiff was not the heir of Robert Marke according to the custom.

(1) See the preceding case.

1836.

Jan. 20, 27.

SHADWELL,
V.-C.

On Appeal.

Lord
COTTENHAM,
L.C.

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The answer was replied to, and evidence was gone into on both sides. * * *

The VICE-CHANCELLOR having made a declaration that the plaintiff was entitled to the premises claimed by the bill, and decreed that the defendants should deliver up possession and surrender the property to the plaintiff, an appeal was brought against that decision.

Mr. Jacob and *Mr. Blake*, in support of the decree. * * *

[426] *Sir W. Horne*, *Mr. Preston*, and *Mr. J. B. Parry*, for the appeal :

[427] * * This was not a case of what might be called a common law custom, like the custom of gavelkind or borough English, though strongly resembling the latter : it was the case of a custom in a particular manor, and the question would be, whether in such a case the issue of a deceased brother were excluded by a surviving sister. Now, upon the authority of *Clements v. Scudamore* (1), it was clear that unless a custom to that effect was distinctly alleged, the brother's children were not to be so excluded. It had not been shewn that in this manor the claim of the issue of a brother, *jure representationis*, had ever been postponed *eo nomine* to the claim of a surviving sister ; and where the custom of the manor was silent, the Court would presume that the descent was according to the course of the common law : *Denn v. Spray* (2). * * *

[428] *Mr. Jacob*, in reply.

[THE LORD CHANCELLOR, after commenting upon the evidence and upon the cases which had been referred to, said :]

[432] It is clear, therefore, that what is proved in this case to be the custom, does not of necessity exclude the extension of the custom to the issue of a deceased brother.

Whether there be more or less probability of this claim being established is not material. The plaintiff, in order to recover,

(1) 1 P. Wms. 63 ; 6 Mod. 120.

(2) 1 R. R. 250 (1 T. R. 466).

must negative the title of the issue of the brother, as she is claiming in derogation of the common law.

I am of opinion that she has not proved this; and that there must, therefore, be an issue to try who was *the heir of Robert Marke, according to the custom of the manor of Taunton Deane; the parties admitting, for the purpose of the trial, that Robert Marke survived his wife, and died on the 5th of February, 1819.

[*Note*.—The result of the issue was a verdict in favour of the defendant, as reported in 2 My. & Cr. 42; the same result followed upon a new trial, as reported in 2 My. & Cr. 635, where the LORD CHANCELLOR expressed his entire approval of the verdict.—O. A. S.]

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SQUIRE v. CAMPBELL.

(1 My. & Cr. 459—486; S. C. 6 L. J. (N. S.) Ch. 41.)

1836.
July 20, 21,
27.

Lord
COTTENHAM,
L.C.
[459]

An Act of Parliament empowered the Commissioners of Woods and Forests to make certain new streets according to a particular plan therein referred to, and to lease, and to enter into agreements for leasing, the ground in the lines of the new streets. Under this power leases were granted of two plots of ground, upon which the lessees erected two particular houses in the line of one of the new streets. Each of the leases described the plot of ground which it demised as being "on the north side of a new street then forming there, called," &c., and as "fronting towards the south on the said new street." The plan referred to in the Act of Parliament exhibited an open space in front of the sites of these houses; but that plan was not mentioned in either of the leases.

The intended streets were completed, and the space in front of the houses was left open. The Commissioners of Woods and Forests, and the Paving Committee of the parish, afterwards gave permission to certain persons to erect an equestrian statue in the open space, and those persons proceeded to place it upon a part of that open space, but without interfering with the line of the carriage way of the new street in which the houses stood. The lessees of the houses thereupon filed a bill to restrain the erection of the statue, alleging that, upon the treaty for the leases, the lessees were shewn the plan of the intended new street and parts adjacent, by which it appeared that the space in question was to be quite open and free from all obstructions, and that it was upon the treaty represented and stated, that opposite the two houses a free passage would be left of certain dimensions, which would be contracted by the erection of the statue; they also alleged, that the

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proposed erection would diminish the value of their property, and be a public and a private nuisance:

Held, that these circumstances did not entitle the lessees to an injunction to restrain the erection of the statue.

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By the Act 53 Geo. III. c. 121, intituled "An Act for making a more convenient communication from Marylebone Park and the Northern Parts of the Metropolis, *in the parish of St. Marylebone, to Charing Cross, within the liberty of Westminster, and for making a more convenient Sewage for the same," after reciting that it would be of great accommodation to the public, and be the means of opening a more easy and ready communication from Marylebone Park and from the northern parts of the metropolis to Charing Cross, if, among other things, "provisions were made for widening the east end of Pall Mall, and for continuing the same eastward by a new street into St. Martin's Lane, terminating at the portico of St. Martin's Church; and for widening Cockspur Street from the south end of the Haymarket to Charing Cross, and for forming an open square in the King's Mews, opposite Charing Cross," it was enacted, that the Commissioners for the time being of his Majesty's Woods, Forests, and Land Revenues, should be Commissioners for carrying the Act into execution; and then, by the third section, after reciting that a map or plan describing the lines of the streets, squares, circusses, ways, passages, and places, and the land and premises, through which the proposed alterations and improvements were to be made or carried by virtue of that Act, together with a book of reference containing a list of the names of the owners and occupiers of such lands and premises, had been made for the purpose of being deposited at the office of the Commissioners of Woods and Forests, it was enacted, that the said map or plan and book of reference, after the same should have been authenticated by the signature of the Speaker of the House of Commons, should be deposited and remain with the Commissioners of Woods and Forests, and that a copy thereof, signed by the Speaker, should be deposited in the Parliament Office. and that another copy so signed should be deposited with the clerk of the peace of the county of Middlesex, within three months after the passing of the *Act, to the end that all persons

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might inspect and peruse the same, and take extracts or copies thereof at their will and pleasure, paying certain fees therein mentioned; and that the Commissioners, in making the alterations and improvements should not deviate, between Piccadilly and Oxford Street, more than twenty yards, nor in any other place more than ten yards, from the lines described in the map or plan, without the consent in writing of the persons through whose lands or premises such deviation should be made: and it was also enacted, that it should not be lawful for the Commissioners to make any such deviation in any case in which any agreement in relation to the line of the said street should have been made by or on behalf of the Commissioners with any person or persons interested in the houses or premises within the limits of the said map or plan, unless with the consent in writing of such person or persons. The Act then authorised the Commissioners, with the consent of any three or more of the Lords of the Treasury, to make the intended streets, squares, &c., over the several lands and premises described in the map or plan and book of reference; and in conformity to the lines described in such map or plan, and to such deviation therefrom as therein mentioned. The Act empowered the Commissioners, with the consent of any three or more of the Lords of the Treasury, to purchase the premises described or comprised in the map or plan and in the book of reference or in the deviation thereinbefore mentioned.

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It was also enacted, that it should be lawful for the Commissioners, with the consent in writing of any three or more of the Lords of the Treasury, to demise or lease, * * any part *of the houses, buildings, lands, tenements, and hereditaments to be purchased, erected, built, altered, repaired, and improved by virtue of the Act, for any term or terms of years not exceeding ninety-nine years from the making thereof.

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[Pursuant to this power, by an indenture of lease dated the 5th of July, 1824, the Commissioners of Woods and Forests duly demised to Douglas Kinnaird, for ninety-nine years from the fifth of April, 1821, a piece of ground on the north side of a new street then forming there called Pall Mall East, and intended as a continuation of Pall Mall from the Haymarket aforesaid towards St. Martin's Church, fronting towards the south on the

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said new street, delineated in the plan thereto, together with the dwelling-house then standing on part thereof, which dwelling-house was known as No. 1 on the north side of the said new street called Pall Mall East, and was the corner house of the said new street, and of the Haymarket.]

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By another indenture of lease of the same date, the Commissioners of Woods and Forests, by virtue of the before-mentioned Act, demised an immediately adjoining plot of ground, also fronting south on the new street, called Pall Mall East, together with the house then erected thereon, to the plaintiff John Squire, for a similar term of ninety-nine years.

The premises comprised in the lease to Douglas Kinnaird afterwards became vested in the plaintiffs Richard Williams, Edward Hosier Williams, and John Allan Powell; and the plaintiffs John Squire, Richard Williams, Frederick Squire, and Frederick Williams, carried on and did still carry on business there as bankers, under the firm of Ransom & Co. The house comprised in the lease to John Squire had ever since its erection been and still was occupied by him.

The following is a description of the vicinity of the houses comprised in the leases before mentioned, after the alteration contemplated by the Act of Parliament had been completed.

From the eastern extremity of Pall Mall three other streets proceeded: namely, the Haymarket, which ran towards the north; Pall Mall East, which continued the line of Pall Mall, towards the east; and Cockspur Street, which diverged in a south-easterly direction towards Charing Cross. The line of houses on the northern side of Pall Mall East formed an immediate continuation of Pall Mall from the southern extremity of the Haymarket, beginning with the two houses of the plaintiffs; and the line of houses on the southernmost side of Cockspur Street ran on, without any interval, from the eastern extremity of Pall Mall; but the lines of houses on the southern side of Pall Mall East and the northernmost *side of Cockspur Street, did not commence immediately from the eastern extremity of Pall Mall, so that an open space, of a triangular form, was there left, in front of the plaintiffs' houses, between the line of Pall Mall East and the line of Cockspur Street.

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A subscription having been set on foot for the purpose of erecting an equestrian statue of King George the Third, the statue was completed by Mr. Wyatt. The committee of the body of subscribers to the erection of the statue were anxious that it should be placed upon the open space before described, and his Majesty having signified his approbation of the intended site, Sir John Campbell, the honorary secretary of the committee of subscribers, applied to the Paving Committee of the parish of St. Martin in the Fields, in which the place in question was situated, for permission to break up the pavement, in order to build a pedestal upon which the statue might be placed, and to surround the pedestal with an iron fence or railing. This permission was granted, upon the condition that the Commissioners of Woods and Forests would undertake to repair and light the statue and the railing by which it should be surrounded; which the Commissioners of Woods and Forests undertook to do accordingly. A licence was then granted, by the direction of the Paving Committee, to Philip Nowell, a mason, to break up the pavement and erect the statue; and he then proceeded with the erection of the pedestal, and surrounded the spot on which it was to be placed with a wooden hoard or boarding.

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The bill was then filed by John Squire, Richard Williams, Frederick Squire, and Frederick Williams, and Edward Hosier Williams, and John Allan Powell, against Sir John Campbell, Philip Nowell, the Commissioners of *Woods and Forests, the Paving Committee of the parish of St. Martin in the Fields, and the *Attorney-General*; and it prayed that Sir John Campbell and Philip Nowell, and their workmen, agents, and servants, might be restrained from erecting the pedestal and statue upon the piece of ground in question, and from further proceeding in the work so commenced by them, and that they might be directed to remove the hoard, and to restore the pavement to its former state.

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The affidavit of the plaintiffs, John Squire and Richard Williams, stated that Douglas Kinnaird and John Squire applied to the Commissioners of Woods and Forests to grant to them respectively leases of the two plots of ground before-mentioned, and that upon the treaty for such leases, Douglas Kinnaird and

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John Squire were shewn the plan of the intended new street and parts adjacent, by which it appeared that the space in front of the said two plots of ground, and which was formerly occupied by houses, was to be quite open and free from all obstructions, and that a public carriage way was to run in front of the houses intended to be built on the north side of the said new street, towards St. Martin's Church; and that it was upon the said treaty represented and stated, that, opposite to the said two houses, a free passage would be left, of above one hundred feet, for carriages and passengers, and which was considered necessary in consequence of the immense traffic in that part of the town, and of its being one of the greatest thoroughfares in London; and that upon the faith of the said plan, and relying upon the aforesaid representations, and feeling assured that the said space in front of the said plots of ground would be quite open and free from all obstructions, Douglas Kinnaird, and the plaintiff, John Squire, were induced to take, and did agree to take, a frontage of eighty-two feet two *inches on the north side of the said new street, and to pay an annual ground rent of four guineas per foot after the first two years, and to lay out thereon, in building, upwards of 20,000*l*.

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This affidavit also stated, that the pedestal would be within thirty-three feet or thereabouts of the foot pavement in front of the said two houses, and that the pedestal was intended to be eleven feet long and five feet wide, and that the statue and the horse upon which it was to be placed would be eighteen feet high (1), and that the railing and lamps round the statue would altogether occupy a space of twenty-two feet in length, and fifteen feet in width, or thereabouts; the consequence of which would be, that the thoroughfare would be much obstructed, and the most serious accidents might happen from the collision of carriages, (the traffic and thoroughfare along the said new street and open space being so very great,) and that foot passengers would be exposed to the greatest peril. The deponents further stated, that they had sent a memorial to the Commissioners of Woods and Forests, praying that the

(1) It appeared by affidavits of must have been included in this other witnesses, that the pedestal estimate of the height of the statue.

erection of the statue might not be permitted, and that in such memorial they were joined by other inhabitants of houses on both sides of the way, and that the reply of the Commissioners was, that they had no jurisdiction over the space in question.

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The deponents further stated, that they believed that their interests would be much affected, and that the value of the said houses would be much lessened, if the erection of the pedestal or statue were permitted. * * *

Upon this affidavit the VICE-CHANCELLOR granted an *ex parte* injunction, in the terms of the prayer of the bill.

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Several affidavits, afterwards sworn on the part of the plaintiffs, stated that the carriage way in front of the houses would, by means of the intended erection, be contracted to thirty-seven feet or thereabouts, which was, in the judgment of the witnesses, quite inadequate to the traffic of so great a thoroughfare; and that the value of the houses of the plaintiffs would be lessened by the contraction of the space, and by the obstruction which the erection would cause to the clear and uninterrupted view to Charing Cross which the plaintiffs now possessed, and by the nuisances which would be committed against the railing; and further, that the erection of the pedestal, statue, and railing would, in the opinion of the witnesses, be a public nuisance, and would be a place of resort for idle persons, and the receptacle of all sorts of filth.

The plan referred to in the Act, 53 Geo. III. c. 121, and deposited in the Parliament Office, bore the following *indorsement: "Plan of a street proposed from Portland Place to Charing Cross, leading from the Crown estate of Marylebone, and affording a broad and uninterrupted access from the Houses of Parliament, and other public buildings in Westminster, to all the principal streets in the west and north-west parts of the town, between Pall Mall and the New Road; for widening the entrance to Pall Mall, and continuing Pall Mall to St. Martin's Church; for widening the narrow part of Cockspur Street; for continuing Charles Street into the Haymarket; for widening Jermyn Street, and improving the purlieus of Carlton House. N.B. The parts shaded blue are Crown property."

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Upon this plan the ground in question was delineated as an open space, without any erection whatever.

The affidavits sworn on the part of the defendants * * stated that the width of carriage way between the houses of the plaintiffs and the railing would be greater than the width of the carriage way at the eastern end of Pall Mall East.

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After these affidavits were filed, the defendants moved, before the Vice-Chancellor, that the injunction might be dissolved. His Honour refused the motion, and it was, therefore, now renewed before the Lord Chancellor.

Sir C. Wetherell, Mr. Jacob, and Mr. Bethell, in support of the motion :

* * The leases form the only contract between the parties, and the leases contain no allusion, direct or indirect, to this subject. * * The mere exhibition of the plan would not amount to a warranty that all the ground should be put or kept in that state: *Feoffees of Heriot's Hospital v. Gibson* (1). * * The case of *Lord Irnham v. Child* (2) shews, that when an instrument has been executed for the purpose of carrying into effect the intentions *of the parties, the Court cannot read the instrument as if an additional stipulation had been inserted, upon the ground that such additional stipulation formed part of the original agreement, unless fraud or mistake can be shewn. * * In the present instance, the agreement, whatever it may have been, has been carried into execution by the lease itself; and the description of the premises which the lease contains, contradicts what is alleged by the plaintiffs to have been the agreement. * * *

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Mr. Wigram and Mr. Lynch, in support of the injunction :

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The *Attorney-General* was made a defendant, because, the freehold being in the Crown, it was supposed *that the Crown might claim some interest in the question.

Upon the treaty for the lease, the lessors shewed a plan in which the houses of the plaintiffs were represented as abutting upon the intended new street, that is, upon the new street which was delineated in the parliamentary plan, by which last-mentioned

(1) 14 R. R. 164 (2 Dow, 301).

(2) 1 Br. C. C. 92. .

plan it appeared that the space in question would be left open, and, therefore, nothing can be built which shall intercept the width of that new street as it appears on the parliamentary plan. *The new street referred to in the leases is sufficiently identified as the new street in which this open space was to be. If the words "the intended new street" have no meaning, a wall may be built up close to the front of the houses.*

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The plaintiffs do not ask the Court to vary a written agreement upon parol evidence, but to interpret a written agreement according to its fair purport. * * *

Neither the defendants, nor the Commissioners of Woods and Forests, nor the Paving Committee, have any right or interest in the soil, and, therefore, they cannot erect or authorise the erection of the statue. The affidavits shew that, not only will this erection be a public nuisance, in consequence of the obstruction it will create in this great thoroughfare, but that it will be a very great private nuisance to all the inhabitants of the neighbouring houses. * * *

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Sir C. Wetherell, in reply :

The lease does not contain any words of reference to the parliamentary plan.

THE LORD CHANCELLOR [after making some general observations, said:]

July 27.

It appears that the plaintiffs' lease is of the date of the year 1824. I have looked through it, and I find that the only part bearing upon the question is that to which my attention has been directed, namely, the description of the premises, and the plan in the margin. The premises in question are described as "on the north side of the new street now forming there, called Pall Mall East, and intended as a continuation of Pall Mall, from the Haymarket towards St. Martin's Church, fronting towards the south on the said new street;" and the lease refers to a plan in the margin. The plan in the margin exhibits the ground plan of the intended houses, but it does not exhibit the place in question, as *there is delineated only a straight line or street in front of the houses, upon which is written "Continuation of

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Pall Mall." The lease, therefore, assists the plaintiffs' case only as it describes the land demised as "in the new street," and as "fronting on the said new street." If the projected erection were of a character so to interfere with this description as to deprive the plaintiffs of the benefit of the demise, that is, "of land in or fronting the new street," a question would arise very different from that with which I have to deal, and upon which, therefore, it is unnecessary for me to give any opinion; as I think it quite clear that the projected erection, if it be at all in "the new street called Pall Mall East," does not so interfere with the character of it as to derogate from the grant to the plaintiffs of land "in or fronting the new street." Upon the lease itself, therefore, without resorting to other extraneous evidence of title, the plaintiffs have no right to what they claim; and, indeed, their case is not rested in the pleadings, or in the affidavits, or in argument, upon the lease, taken by itself. Upon looking at the plan, it will be seen that the *locus in quo* lies between two streets, each of which has a distinct name, and it would be extremely difficult to establish that it was in Pall Mall East; it appears to be no more in Pall Mall East than in Cockspur Street; it is beyond the continuation of Pall Mall East.

Assuming, then, that the lease does not confer the right claimed, it is to be considered, whether the other evidence called in aid of the plaintiffs' title be admissible, and if admissible, how far it establishes their case.

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The first piece of evidence produced is the Act for making the new street. That Act provided that plans of the projected improvements should be prepared and *deposited in certain places for preservation and ready access to the public; but this provision for the deposit of plans, was made for the purpose of enabling the Commissioners to complete the line of the new street, by authorising them to purchase the houses in the intended line only. It was to operate as between the public and the owners of the old houses; it had no reference to the purchase of the houses to be erected, or the lessees of the land to be demised.

An Act of Parliament may, undoubtedly, constitute a contract between those who deal together under its provisions; but the Commissioners of Woods and Forests, having obtained the

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dominion over the property under the provisions of this Act, were to deal with the future tenants of it by virtue of the powers vested in them as such Commissioners. Their dealings with such tenants were in no respect under the provisions of this Act. The Act, therefore, does not aid the plaintiffs' case, except as it shews that plans were to be made, and so far confirms the affidavits, which state that some plan was exhibited to the lessees before they agreed for their leases. The affidavit of Mr. Squire and Mr. Williams states, that, upon the treaty for such leases, Douglas Kinnaird and John Squire were shewn the plan of the intended new street and the parts adjacent, by which it appeared that the space in front of the said two plots of ground, and which then was formerly occupied by houses, was to be quite open and free from all obstructions, and that a public carriage way was to run in front of the houses intended to be built on the north side of the said new street towards St. Martin's Church; and that it was upon the said treaty represented and stated, that, opposite to the said two houses, a free passage would be left, of above one hundred feet, for carriages and passengers, and which was considered necessary in consequence of the *immense traffic in that part of the town, and of its being one of the greatest thoroughfares in London. That is all which the affidavit states as to what took place at the time of the contract. The affidavit does not state who made the representation, or who shewed the plan, or what the plan was; but I will suppose it to state that a plan was shewn by some person authorised to act for the lessors, and that the plan shewed a space such as it has hitherto existed. The will raise (1) this question, whether, in the absence of all fraud, mistake, or misapprehension, the mere exhibition of a plan of property, part of which the lessee takes, gives such lessee a right to say that all the other part of the property exhibited upon such plan shall continue, during his lease, in the same state in which it was exhibited upon the plan, or, if it was not at the time in such state, shall be made to assume such state, and to have the assistance of this Court to enforce such right; the lease granted to each lessee being wholly silent as to any provision for that

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(1) *Sic.* The Law Journal report question is then raised whether," (6 L. J. (N. S.) Ch. p. 44) reads "A etc.—F. P.

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purpose. If this be so, it must be so upon the ground of contract; if it be contract, why should it not apply to the most distant part of the plan exhibited? It may be that the lessee has less interest in some parts of the property exhibited on the plan; but the Court is not to enforce or refuse to enforce the contract as to any particular part, because the party applying to the Court has less interest in that particular part than in some other. If the Court enforces the contract at all, it enforces it in all its parts, whether more or less material to the plaintiffs. If contract be the ground for the interference of the Court, it is as applicable to the statue at the top of Portland Place as to the statue now in question, although it may be very true that the plaintiffs may not have so much interest in that distant part of the property delineated on the plan as in the part which is now in question. This proposition would evidently *lead to most absurd consequences. A man who is about to sell a corner of an estate may exhibit a plan of the whole estate, in order to shew the relative position of that part which he is about to sell; but is he, on that account, to have his hands for ever tied up from the enjoyment and use of all other parts of the estate, and is he to preserve it in exactly its present state?

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If, however, the right to the injunction is to be put upon the ground of contract, it is necessary to consider how, in point of law, it is to be supported. Such a contract must be looked for *dehors* the deed. The case assumes that the contract has been carried into effect, and that the estate contracted for has been created by the lease. New agreements by way of covenant are entered into, to secure the objects of the grant, but the contract for the lease exists no longer.

The plaintiff's case is not that a provision has been omitted out of the lease, by fraud, misapprehension, or mistake; and it is therefore unnecessary to consider what might be the effect of such a case stated and proved; but his case is that, independently of what was stipulated for by the agreement, and of what was provided for by the deed, a separate and distinct contract arose from the mere exhibition of the plan. Can there, however, be such a separate contract? There was but one object, and one thing contracted for: the agreement had various terms, but all

constituted but one agreement; and if so, then the parol agreement was merged in the written contract, if there was one, and both were merged in the deed. The case of *Lord Irnham v. Child* (1) is very similar to the present case, for a deed had there been executed for the purpose *of carrying the intention of the parties into effect; and it was proved in the cause that a certain contract not appearing on the deed had been entered into between the parties, and that for a particular reason it had been purposely omitted from the deed.

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It is a familiar doctrine in this Court, that, although to resist a specific performance, a defendant may shew, by parol, that the written document does not represent the contract between the parties, yet a plaintiff cannot have a decree for a specific performance of a written contract, with a variation, upon parol evidence: *Woolam v. Hearn* (2), *The Marquis Townshend v. Stangroom* (3), *Higginson v. Clowes* (4). How much stronger is the objection where the contract has been carried into execution, a deed executed, and the estate conveyed. It is true, that the case was not attempted to be supported at the Bar upon this ground; but I think it comes to this. The argument at the Bar was, that the lease mentioned a street, that is, the new street, Pall Mall East, and that it was, therefore, competent to the plaintiffs to shew by parol evidence what such new street was; and several cases at law and in equity were cited to establish that proposition; such as *Hodges v. Horsfall* (5), *Saunderson v. Jackson* (6), *Shortrede v. Cheek* (7); but in all those cases, the agreement referred to some other document or thing, and the only question was, the identity of the thing referred to: in none of them was there any attempt to introduce an additional term into an agreement by extrinsic evidence. Had there been any doubt as to what was meant by the new street, evidence might have been admissible to remove *it, but not to establish an additional agreement as to the manner in which such new street, or any adjoining land, was to be dealt with. The evidence

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(1) 1 Br. C. C. 92.

(2) 6 R. R. 113 (7 Ves. 211).

(3) 5 R. R. 312 (6 Ves. 328).

(4) 10 R. R. 112 (15 Ves. 516).

(5) 32 R. R. 157 (1 Russ. & My. 116).

(6) 5 R. R. 580 (2 Bos. & P. 238).

(7) 40 R. R. 258 (1 Ad. & El. 57).

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might be admissible, for the purpose of shewing that the projected erection would destroy the character of the thing described in the lease; namely, the new street, in which the premises demised are described as being situate; but I have before said that I think it wholly inefficient for that purpose, and I therefore abstain from giving any opinion as to what would have been the result, in point of law, if the evidence had established the fact.

Of the cases at all in *pari materiâ* with the present, one only appears to be in point. *The Duke of Bedford v. The British Museum* (1) clearly is not, for in that case there was a covenant, and the only question was, whether the benefit of it had been lost by the covenantee. In *Rankin v. Huskisson* (2) the plaintiff's allegation was, that it had been agreed that the plot of ground in question should be laid out as a garden, and that no buildings should be erected upon it; the plaintiffs claimed the benefit of a parol agreement, upon the ground of part performance, and sought to enforce their alleged agreement, by injunction: the only question was, whether the agreement was proved; and the Court, being of opinion that it was sufficiently established for the purposes of an injunction, made the order.

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But in the case of *The Feoffees of Heriot's Hospital v. Gibson* (3), though a case from Scotland, Lords ELDON and REDESDALE expressed opinions directly bearing upon the present case. That case was almost in terms the same as the present case, throwing out of view the *strange opinions expressed by the Court of Session. The case was simply this. The magistrates of Edinburgh, together with the feoffees of Heriot's Hospital, projected a new street, and had plans of it prepared. The magistrates and the hospital agreed together to sell plots of ground for building; the magistrates taking a sum as purchase money, and a feu duty being reserved to the hospital. The magistrates concurred with the feoffees of Heriot's Hospital in exhibiting a plan of the intended street, and the respondent purchased, under the exhibition of that plan, a certain part of the land. The plan, however, was not referred to in the feu charter or grant. An Act of Parliament had empowered the magistrates to obtain,

(1) 39 R. R. 288 (2 My. & K. 552).

(3) 14 R. R. 164 (2 Dow, 301).

(2) 33 R. R. 86 (4 Sim. 13).

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within a limited time, certain property, the acquisition of which was necessary to enable them to carry the plan into effect. That property was not obtained within the time prescribed by the Act, which time, indeed, had already expired when the plan was exhibited to the respondent. The magistrates being unable to complete the street according to the plan, the respondent refused to pay his feu duty. The case went through various gradations of contest, and in the end, the Court of Session seemed to think, that the question would turn upon the magistrates having neglected to embrace a particular opportunity of acquiring, at a reasonable price, the property necessary to complete the street according to the plan. When the case came before the House of Lords, however, that view of the Court of Session was entirely disregarded, and the expressed opinions of the learned Lords who decided it in that House proceeded upon different grounds. Nothing turned upon the particular law of Scotland; and the general principles upon which the decision was made are as applicable to the present case as to that. Lord ELDON expressed himself thus: "It was perfectly wild to say that the mere exhibition of a *plan was sufficient to form a binding contract. One man might purchase on the notion that the intended street would soon be completed; another, perhaps, with the idea that it would not. But the whole amounted to this: 'You may purchase on the notion that this plan will be executed, but all that we have any thing to do with is our contract.' The feuar then enters into a solemn contract, and if his contract contained nothing about this, how could he say that the magistrates were bound by the plan. The feu charter was the material document here, and must be carefully examined. There might be such an obligation in it as that here contended for, but it appeared to him that the judgment could not rest on the ground which the Court below had taken."

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He then upon a subsequent day expressed himself thus: "From these two last interlocutors the present appeal was brought. There was a reference to one case (1), where the

(1) *The Prince's Street case*, *Deus* referred to, 14 R. R. 166 (2 Dow, v. *The Magistrates of Edinburgh*; 304).
House of Lords, April 10th, 1772,

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magistrates exhibited a plan, with a beautiful view of the disposition of the grounds in front of the new buildings to be erected, a thing which was done here every day without any idea that the proprietors were to be prevented from erecting other houses merely by having exhibited a different disposition of the grounds in a picture, unless it were so stipulated in the contracts between the parties. The magistrates—the ground being their own—began to erect houses where they had exhibited terraces and walks. An action of declarator was brought, to have it declared that the magistrates were not entitled to erect these new buildings, without consent of the feuars, and a process *of suspension was also instituted, to stop the progress of the work in the mean time. The Court refused to pass the bill, and the question came to this House, where Lord MANSFIELD, who would be remembered as long as the law of England or of Scotland existed, made a very eloquent speech. But after all that he had said, what he did was merely to give an opportunity of examining the question of right. He could easily conceive that deference to his opinion had put an end to further proceedings in that case, the corporation having been, perhaps, almost frightened out of their senses by his speech; but still this was no judgment upon the question of right, and at any rate there was a material distinction between that case and the present. This was not a case where one restricted himself as to the free use of his own land, but where he was supposed to have become bound, without a special contract to that effect, to make himself owner of the lands of others. He held it in all cases to be dangerous that when men had put their contracts into the solemn form of a charter, they should look, not at what was contained in that charter, but say that the charter should operate as if a term had been in it which was not there, merely because there had been some representation about such a condition at the time the contract was framed."

Lord ELDON was here referring to a different case; but it shews how very important his observations are, because he is making them when he has before him a very strong opinion expressed by Lord MANSFIELD in a case of a similar kind.

Lord ELDON added, that "He dared not advise their Lordships

to say that this plan was a warranty. The whole amounted to this only—that the parties might entertain a rational hope that what was exhibited might *be done in the course of improvement. But there was no ground to say that this amounted to an engagement that it should be done.”

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LORD REDESDALE said, “It appeared to him to be dangerous, when parties entered into a contract, to suffer any thing to affect it which was extraneous to what was in the contract itself. There was no undertaking by the governors of the hospital that this street should be completed, and they could not with propriety have entered into any such undertaking; for the effect would be to deprive them of any benefit from the property, except they compelled the magistrates to make this street.” “If they were bound at all, they were bound whatever might be the expense; and how the neglect of opportunity to purchase at a reasonable price came into question at all he could not understand. They were bound, even if the thing became impossible—bound, so far as to be liable to answer in damages; and it was only in the form of damages that the governors of the hospital could proceed against the magistrates. If there was a contract at all, it could not be of the nature supposed by the Court below. But he concurred in the opinion, that the exhibition of the plan was no warranty.”

These opinions were expressed in a case so similar to the present, that one seldom finds the circumstances of one case running so nearly to the circumstances of another, as the circumstances of that case run to the circumstances of this. We have the unqualified opinions of Lord ELDON and Lord REDESDALE—opposed, not to anything which Lord MANSFIELD had done, but to what, in order to frighten the parties, he had said—that after parties had matured their agreement into a written contract, you could not infer a contract from the *mere exhibition of a plan. It is impossible not to assent to the doctrine expressed by these two learned Judges, and it is equally impossible to maintain the order appealed from, consistently with such doctrine.

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It is hardly necessary for me to say one word upon the subject of nuisance. It is said that the statue will be a public nuisance.

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This it can only be, by obstructing the carriage way; but I am clearly of opinion that the erection of the statue will, upon the whole, be a great benefit to the public; by which I mean the public as contradistinguished from the occupiers of the adjoining houses. It is quite immaterial, in my view of this case, whether a majority of the inhabitants of the neighbouring houses do or do not object to the erection of the statue, and I give no opinion as to whether it is likely to depreciate the value of the property of the plaintiffs, or to interfere with their enjoyment of it; of that they are the best judges; but I am very clearly of opinion, that the injury and inconvenience, if any, do not constitute such a description of private nuisance as would justify the interference of this Court upon that ground. It is not, as is said in one case (1), because the value of the property may be lessened, and it is not, as is said in another (2), because a pleasant prospect may be shut out, that this Court is to interfere; it must be an injury very different, in its nature and its origin, to justify such an interference.

If the plaintiffs conceive themselves aggrieved, all the other remedies of the law are open to them; but having considered the case in all its bearings, and being of opinion that it cannot be brought within any of the rules of this Court, with reference to injunctions, I am bound to discharge the order, and

Dissolve the injunction.

1836.
Aug. 4.
Nov. 4.

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STOREY v. LORD JOHN GEORGE LENNOX (3).

(1 My. & Cr. 525—537; S. C. 6 L. J. (N. S.) Ch. 99.)

A person who had effected an insurance upon another's life, commenced an action against the trustees of the Insurance Company, for the recovery of the amount insured. The trustees filed a bill of discovery against him, in aid of their defence to the action, charging that the declaration upon the basis of which the insurance had been effected, was untrue, and that the defendant had in his possession various documents, by which the truth of the matters alleged in the bill would appear, and requiring him to produce them. The defendant by his answer, stated that he had in his possession the documents, which he enumerated in the

(1) See 1 Dick. 175, and 10 R. R. (3) *Marriott v. Chamberlain* (1886) 188 (16 Ves. 342). 17 Q. B. Div. 154, 55 L. J. Q. B. 448.

(2) See 1 Dick. 175.

first schedule to his answer, but that from a certain period after the death of the person whose life was insured, he considered it possible that the Insurance Company had it in contemplation to dispute their liability; and, therefore, from that period he contemplated the necessity of bringing the action: and, he added, that the documents mentioned in the first schedule were and contained information furnished to him, as to evidence which could be procured or given on his behalf against the company; and that the production of the documents might disclose the names of witnesses intended to be examined, and evidence intended to be given, on his behalf, in the action, and in the present suit; and he submitted that he ought not to be compelled to produce any of the documents mentioned in that schedule. He admitted the possession of certain other documents, mentioned in the second schedule, and then added, that excepting the particulars mentioned in the two schedules, he had not in his possession any documents relating to the matters mentioned in the bill, whereby the truth thereof would appear:

Held, first, that the admissions in the answer, coupled with the description of some of the documents given in the first schedule, were sufficient admissions that the documents were such, as under the ordinary rule, the plaintiffs were entitled to inspect:

Held, secondly, that the statement of the possible effect of the discovery was not a sufficient ground for withholding it:

Held, thirdly, that with respect to such of the documents as did not fall within the rule of professional confidence, the defendant was not entitled to contend that he was protected from producing them, by the circumstance of their having come into existence after litigation was contemplated, inasmuch as, in the opinion of the Court, that ground of defence was not sufficiently raised by the answer.

In the month of August, 1832, the defendant insured in the office of the Pelican Life Insurance Company, the life of Edmund Meysey Wigley Greswolde, then Major of the sixth regiment of dragoons, for the sum of 5,000*l.* for seven years. The declaration subscribed on behalf of the defendant, and upon which the insurance was made, stated, that Major Greswolde had never been seriously ill since a child, that his general state of health was very good, that he was then in perfect good health, that he *had not been, and was not subject to fits, and that his habits of living were sober and temperate: and the defendant declared, that he had not concealed any fact material to be known to the assurers. The policy of assurance contained a proviso for making it void, if the declaration should turn out to be in any respect untrue.

Major Greswolde died at Cahir in Ireland, on the 6th of January, 1833. The Pelican Life Insurance Company having refused to pay to the defendant the amount of his insurance,

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he, on the 26th of March, 1836, commenced an action for the recovery of it against the plaintiffs, as being three of the directors of the Company, and as being the persons who had subscribed the policy. The plaintiffs thereupon filed the present bill of discovery, in aid of their defence to the action, and for an injunction in the meantime.

The bill specified various particulars, in which it alleged that the declaration was untrue, and charged the defendant with knowledge of such particulars, at the time at which the declaration was made. The bill charged that the defendant, his solicitor or agents, then or lately had, in his or their possession, custody, or power, divers deeds, certificates of medical men, documents, accounts, books, letters, papers, and writings, whereby the truth of the matters and things therein-before mentioned, or some of them would appear; and it charged that he should set forth a list of such particulars, and should leave them in the hands of his clerk in Court for the usual purposes.

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The answer contained the following passage: "And this defendant further answering saith, he hath in his possession, or power, the several letters and other papers *mentioned and enumerated in the first schedule to this his answer annexed, and which he prays may be taken as part thereof, but this defendant saith that on or about the 9th day of February, 1833, this defendant received a letter dated the 5th day of February, containing information, that since the death of the said E. M. W. Greswolde, a professional gentleman from London, had, on behalf of some or one of the insurance companies, with whom policies of insurance had been effected on the life of the said E. M. W. Greswolde, been at Cahir, for the purpose of obtaining evidence, as to the health and habits of the said E. M. W. Greswolde; and this defendant from that time, by reason of that information, considered it possible, that the said complainants, and the other insurance companies, with whom policies had, on this defendant's behalf, been effected on the life of the said E. M. W. Greswolde, had it in contemplation to dispute their liability to pay this defendant; wherefore this defendant from that time, down to the times at which this

defendant brought his aforesaid action against the said complainants, and actions against the other creditors aforesaid, contemplated the bringing actions against them, to compel them to pay their several policies aforesaid, if they should refuse doing so. And this defendant saith, that the several letters and papers, mentioned and enumerated in the first schedule hereto annexed, are and contain information furnished to this defendant, as to evidence which can be procured or given, on this defendant's behalf, against the said complainants, and the said insurance offices aforesaid, and that the producing the same, or any part of them, to the said complainants, or permitting the said complainants to inspect the same or any of them, might disclose the names of witnesses intended to be examined, and evidence intended to be given, on behalf of this defendant, in the aforesaid action of this defendant against the said complainants, *and in the other actions aforesaid, and in the present suit. And this defendant humbly submits, he ought not to be compelled to produce any of the letters and papers mentioned and enumerated in the first schedule hereto. And this defendant further saith, that exclusive of, and besides the several particulars mentioned and enumerated in the first schedule hereto, he hath in his possession or power, the several particulars mentioned and enumerated in the second schedule hereto, and which he prays may be taken as part thereof; and he saith that save as aforesaid, and excepting the same particulars mentioned and enumerated in the schedules to this his answer annexed, he hath not, and to the best of his recollection and belief, never had, in his possession or power, or in the possession or power of his solicitors or agents, any deeds or deed, documents or document, certificates or certificate of medical men, accounts or account, books or book, letters or letter, papers or paper, or writings or writing, relating to, or touching, or concerning the matters in the said bill of complaint mentioned, or any of those matters, whereby the truth thereof, or of any of them, would appear."

The first schedule to the answer enumerated the following documents, viz.: various letters to the defendant from Mr. Callow and Mr. Knott, the surgeon and assistant surgeon of

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the regiment, and from Major Ratcliffe, the major of the regiment, and from the defendant's solicitors, and from other persons, of various dates, from the 5th of February, 1833, to the 21st of May, 1835; "a certificate or affidavit" of Messrs. Callow and Knott, and, under the date 24th of February, 1833, "a statement or report of the said William Knott, as to the general health of said E. M. W. Greswolde," and under the date 4th of March, 1833, "a copy of a certificate from the said Mr. Knott about this time, and of his correspondence with Mr. *W. J. Lewis as to the health of said E. M. W. Greswolde;" a copy of the defendant's answer to one of the letters addressed to him; and letters from different persons to third parties: "A statement prepared for the opinion of defendant's counsel, in or about July, 1833, after the said insurance offices had refused payment to defendant of the monies assured by them on the life of said E. M. W. Greswolde;" the copy of an opinion of one counsel, and a statement and opinion thereon of another counsel; and a form of notice served by the defendant's desire upon the insurance offices, claiming interest on the monies payable to him. The defendant added that there were, as he believed, in the possession of his solicitor, divers pleadings, papers, statements, letters, and instructions laid before counsel for advice, preparatory to the institution and during the progress of the litigation between the defendant and the several offices of assurance upon whom the defendant had claims.

The second schedule enumerated—besides letters to the defendant from his solicitor, and from Major Ratcliffe,—a bond and deed of covenant given to the defendant by Major Greswolde to secure 11,000*l.* and interest; the policy of assurance; a certificate of Major Greswolde's baptism, and a copy of a certificate of his death; a draft letter to the secretary of the Pelican Insurance Company, and a letter from such secretary to the defendant's solicitor; a draft affidavit as to Major Greswolde's identity.

Upon a motion being made before the Master of the Rolls, for the production of the several deeds, letters, papers, and writings admitted by the defendant's answer and by the schedules thereto

to be in his custody, possession, or power, his Lordship ordered the defendant to produce “the several deeds, letters, papers, and *writings, mentioned and set forth in the schedules to the answer, other than and except the letters written to and from the solicitors of the parties in this cause, or either of them, and the statements prepared for the opinions of counsel, and the opinions of counsel thereon in the said answer mentioned, and admitted by the said defendant by his said answer to be in his possession.”

The defendant now moved to discharge the order made at the Rolls.

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Mr. Swanston and Mr. Lorat, in support of the motion :

* * No distinction can be made between correspondence passing between a defendant himself and third parties, and correspondence passing between his solicitor and third parties.

* * The answer does not admit that the documents in question prove the plaintiffs' case, but, on the other hand, it says that they constitute the defendant's evidence.

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Mr. Wigram and Mr. Richards, *contra* [cited *Whitbread v. Gurney* (1)]:

Communications between a party and his counsel or solicitor are protected, because such communications must necessarily be very often of the most confidential character; but the privilege has never been extended to a party's *communications with any other person. The same rule would apply here as at *Nisi Prius*, by which even a solicitor is bound to communicate all that he learns otherwise than for the purpose of a cause or suit: *Williams v. Mundie* (2), *Greenough v. Gaskell* (3). * * It is a necessary inference from the statements in the present answer, that the documents in question relate to the plaintiffs' case; and that is sufficient. It is true that the charge in the bill, that the documents in the defendant's possession relate to the plaintiffs' case, has not been answered; but it is enough for the plaintiffs to *shew, by reference to the documents, as described in the

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(1) 34 B. R. 294 (Younge, 541).

(3) 36 R. R. 258 (1 My. & K. 98).

(2) Ry. & Moo. 34.

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answer and the schedule, that they are relevant to the plaintiffs' case. * * *

Nov. 4.

Mr. Swanston, in reply. * * *

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THE LORD CHANCELLOR (after stating the case made by the bill, and the passages in the answer and the schedules) :

When this motion was argued before the Master of the Rolls, it seems to have been assumed, that there was a sufficient admission on the part of the defendant, to entitle the plaintiffs to move for a production of the papers in question ; and a sufficient statement by the defendant to entitle him to resist the production, upon the grounds insisted upon in the argument ; no question upon either of these points appearing to have been made before the Master of the Rolls.

When the motion was argued before me by way of appeal, it occurred to me, that there might be some doubt, whether the answer contained a sufficient admission, to entitle the plaintiffs to move for the production of the documents in question. To entitle the plaintiffs to an order for that purpose, they must shew an admission, that the documents which they seek to inspect, are in the possession of the defendant ; and that they are of a nature to entitle the plaintiffs to an inspection of them. And where an answer is framed so as to meet the form of words commonly used in the interrogatory for that purpose, no question of this kind can arise ; but in this case the defendant has not answered the interrogatory, except by making his statement as to the documents in the two schedules, and then denying, in the words of the interrogatory, the possession of any *others. So that it is by implication only, and not by any direct admission, that the plaintiffs can shew from the answer, that the documents fall under the description contained in the answer.

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Upon examining, however, the passage in the answer referring to the schedules, and the schedules themselves, I think that there are sufficient admissions, that the documents in question are such as the plaintiffs, according to the ordinary rule, are entitled to inspect. The description of the documents themselves, in the schedules, is, in many instances, sufficient for that

purpose, and as to others, the passage in the body of the answer referring to the first schedule says, that the letters and papers mentioned and enumerated in the first schedule, are and contain information furnished to the defendant as to evidence which can be procured or given, on the defendant's behalf against the plaintiffs. There is, therefore, an admission that all the papers relate to the subject-matter of the bill, and that being so, the plaintiffs are entitled to inspect them, unless the defendant has by his answer stated circumstances which entitle him to be protected against the operation of the ordinary rule.

Now, the ground upon which the defendant insists that the plaintiffs ought not to inspect these documents, is to be found in the next passage in the answer, in which he says, that the producing the same, or any part of them to the plaintiffs, or permitting the plaintiffs to inspect the same or any of them, might disclose the names of witnesses intended to be examined, and evidence intended to be given on behalf of the defendant, in the said action of the defendant against the plaintiffs, and in the other actions aforesaid, and in the present suit; which suit, it is to be observed, is a bill of discovery, in aid of a defence to an action at law.

The plaintiffs, moving upon this answer, must undoubtedly take as true what the defendant alleges relative to the subject-matter of the motion; but care must be taken, that the defendant be not permitted by a general allegation to defeat the plaintiffs' right, without incurring the danger which attends a false allegation in an answer. If this were to be permitted, it would indeed afford the means of overturning a most important part of the protection which this Court affords to the rights of parties. The protection on the ground of professional confidence, is not set up in the body of the answer, and is only to be inferred from the description of the documents in the schedule itself. The defendant has set up no defence against the production, unless the proposition can be maintained, that a plaintiff is not entitled to inspect any document which is and contains information furnished to the defendant, as to evidence which can be produced or given on the defendant's behalf against a plaintiff, the producing of which to the plaintiff might disclose the names

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of witnesses intended to be examined, and evidence intended to be given on behalf of the defendant in the action. Can it be said that every document of which this can truly be affirmed is a privileged document? Suppose, for instance, that some of the letters in the schedule contained a statement, without any inquiry on the part of the defendant, of circumstances relating to the life insured, which would shew that it was not an insurable life, and shewing that the plaintiff at law knew such to be the case, and had admitted it, but stating that some medical person named had been heard to express an opinion favourable to the case of the plaintiff at law, or some fact tending to repel such a conclusion; such a letter or document would answer the whole of the description in the answer; but it could not be said that the plaintiffs in equity had no right to any information as to such a document.

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The proposition raised at the Bar was this, that it had been decided that a defendant is not bound to produce, for the inspection of his opponent, what may have passed between himself and any professional adviser, relative to the matter in contest, though before any litigation had commenced, provided that what so passed was in contemplation of expected litigation; that a party engaged in litigation is not bound to employ professional assistance, and still less, when litigation is only expected; that a party, therefore, acting for himself, and corresponding with others with a view to actual or expected litigation, ought to be equally protected against being compelled to reveal the result of his inquiries. Were I to give any opinion upon this proposition, it would be wholly extra-judicial; for I think that, supposing it to be capable of being supported, the defendant has not in this case so raised the defence by his answer as to entitle him to the benefit of it.

The MASTER OF THE ROLLS has by his order protected the defendant from producing any communications between himself and his professional advisers; and I am of opinion that he has given to the defendant the full benefit to which he is entitled.

Upon the ground, therefore, that the answer contains sufficient admissions that the documents in question so relate to the matters in issue as to entitle the plaintiff to an inspection of

them, according to the ordinary rule, and that it does not contain any statement sufficient to entitle the defendant to protection against the operation of the ordinary rule, I am of opinion that the order of the MASTER OF THE ROLLS is right, and that the motion to discharge it must be

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Refused with costs.

METCALFE v. THE ARCHBISHOP OF YORK.

(6 Simons, 224—238; affirmed 1 My. & Cr. 547—559; S. C. 6 L. J. (N. S.) Ch. 65.)

In the year 1803 the Act 43 Geo. III. c. 84, repealed the Act 13 Eliz. c. 20, which prohibited the charging of benefices. In the year 1817 the Act 43 Geo. III. was repealed, and the effect of the repeal was to revive the Act of Elizabeth. In the year 1811 an incumbent duly charged his then present benefice with an annuity, and covenanted, that if he should afterwards be preferred to any other benefice, he would fully charge the same with the annuity; and that in the meantime, the same should be charged and chargeable with the annuity. In the year 1814, the incumbent was preferred to another benefice, but no legal charge upon it was executed until the year 1818: Held, in the Court below, and upon appeal, that the deed of 1811 constituted a good equitable charge, which attached upon the new benefice as soon as it was acquired. There being subsequent incumbrancers, an order for a receiver was made at the hearing, and affirmed on appeal.

1833.
June 13, 17
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SHADWELL,
V.-C.

On Appeal.
1836.
Feb. 11.
Nov. 9.

—
Lord
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[547]

By an indenture of the 9th of August, 1811, the Rev. William Warrington, the then incumbent of the vicarage of St. Lawrence Jewry, with the rectory of St. Mary Magdalen in the city of London annexed, in consideration of 900*l.*, granted an annuity of 150*l.* during his life, to James Cottle, charged, during his incumbency, on the vicarage and rectory; and, for better securing the annuity, Warrington demised the vicarage and rectory to a trustee for ninety-nine years, if Warrington should so long live, and covenanted, with Cottle, for the payment of the annuity, and, moreover, that in case he should, at any time or times thereafter, be preferred or promoted to any other ecclesiastical benefice or benefices, in lieu of or in exchange for, or in addition to his then vicarage and rectory or his church or ecclesiastical preferment for the time being, he would, at his own costs and charges, within three calendar months next after such events should happen, fully charge the same benefice

[6 Sim. 224]

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or benefices with payment of the annuity of 150*l.*, and also demise the same to a trustee of Cottle's nomination, in the same manner, in all respects, as the vicarage and rectory were thereby charged and demised for securing the annuity; and that, in the mean time, the same benefice and benefices should be charged and chargeable with and liable to the payment of the annuity of 150*l.*; and, as a further security for the *annuity, Warrington executed a warrant of attorney, dated the same 9th of August, 1811, on which a judgment for 1,800*l.* and costs was shortly afterwards entered up and docketed, and memorials of the securities were duly enrolled in the Court of Chancery.

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By an indenture of the 12th of January, 1813, Cottle, in consideration of 800*l.*, assigned the annuity and all the remedies for recovering the same, to the plaintiff, and it was declared that the trustee should stand possessed of the residue of the term of ninety-nine years, in trust for securing the punctual payment of the annuity to the plaintiff.

The annuity being in arrear, the plaintiff, in Michaelmas Term, 1813, sequestered the benefices under the judgment. In November, 1814, and whilst the sequestration was in force, Warrington exchanged those benefices for the vicarage of Leake, in the North Riding of Yorkshire; and, by an indenture of the 10th of November, 1818 (1), after reciting the deed of August, 1811, and the covenant for charging any benefice to be taken in exchange, he, in pursuance of the covenant, charged the vicarage of Leake with the annuity and the arrears thereof, and empowered the plaintiff to distrain upon it, in the same manner as if it had been originally charged with the annuity, and he demised the vicarage to a trustee, for ninety-nine years, for better securing the annuity. A memorial of this indenture was enrolled in the Court of Chancery; and, on the 30th of November, 1818, another memorial of it *was registered in the North Riding of Yorkshire. In and after April, 1815, the plaintiff caused several sequestrations to be issued, under the judgment, against the vicarage of Leake.

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On the 9th of August, 1832, Warrington executed a warrant

(1) It was alleged that the delay in procuring this deed was occasioned by Warrington being abroad.

of attorney, on which a judgment was, on the following day, entered up against him at the suit of the defendants Meggison, Pringle and Manisty, for 500*l.* and costs. That judgment was docketed and registered in the North Riding of Yorkshire, and a sequestration was issued under it against the vicarage of Leake.

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[There was evidence to shew that the defendants Meggison, Pringle and Manisty had notice of the deed of the 9th of August, 1811, before they obtained their judgment.]

[The question arose whether the plaintiff had acquired such a charge on the living under the deed of the 9th of August, 1811, as entitled him to priority over the judgment subsequently obtained and registered by the defendants.]

Mr. Knight and *Mr. Metcalfe*, for the plaintiffs.

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Mr. Jacob and *Mr. Purvis*, for the defendants Meggison & Co.

Mr. Cockerell, for the Archbishop of York.

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Mr. Bellamy, for the executors of Cottle's trustee.

THE VICE-CHANCELLOR, after reading the covenant to charge in the deed of August, 1811, said :

The only question which I have to decide, is whether the concluding words of this covenant did, in the contemplation of this Court, take effect on the new living as soon as it was acquired, so as to create a valid charge upon it. My opinion is that those words did immediately fasten on the new living, and that it was not necessary for the covenantee to resort to the machinery of a new charge, unless he chose to be at the expense of it. The annuity was granted for a valuable consideration, and the charge was equally good whether the annuitant did or did not afterwards obtain a complete execution of the covenant.

This is like those cases in which parties, on their marriage, have agreed that their estates, generally, shall be liable to pay a jointure. Such an agreement operates, immediately, to charge all the estates which the parties have, although no formal charge is subsequently executed.

If the plaintiff had filed his bill he might have had a decree prior to the passing of the 57 Geo. III.; and, *if he did not

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choose to have a charge, this Court would have protected him by its decree. If the covenant operated as an immediate charge, the effect is the same as if a formal charge had been made, which the subsequent Act could not set aside.

There can be no doubt that Meggison, Pringle and Manisty had notice of the deed of August, 1811, before they took their security; and though, probably, neither they nor the plaintiff were, at the time, fully aware of the legal effect of that deed, they must be taken to have had notice of it to all intents and purposes; and, therefore, the plaintiff has now a right to have that deed put in force. The consequence is that, as against those gentlemen, the plaintiff is entitled to be considered as the first incumbrancer on the vicarage of Leake. He was in possession under his sequestration, and they applied to a court of law and turned him out of possession; but, as he was turned out of possession contrary to the effect of the covenant, this Court will consider him as being in possession *ab initio*; for this Court will put parties into the situation in which they ought to have been. The money which the defendants have received from the plaintiff, must be paid back, and, if any profits have been received under the second sequestration, those profits also must be paid over to him so far as to cover the arrears of the annuity; and, in order to provide for the future payments, the receiver must be continued.

1836.

[1 My. & Cr. 547] The defendants Meggison, Pringle, and Manisty, now appealed from the VICE-CHANCELLOR's decree.

Mr. Tinney and *Mr. Metcalfe*, for the plaintiff, in support of the decree. .

* * * *

[549] *Mr. Jacob* and *Mr. Purvis*, for the defendants Meggison, Pringle and Manisty. * * *

[551] *Mr. Tinney*, in reply. * * *

Nov. 9. THE LORD CHANCELLOR :

[553] This was an appeal by certain of the defendants, judgment creditors of the Rev. Mr. Warrington, vicar of the parish of

Leake; and the question is, whether the plaintiff has or has not a preferable charge upon, and title to the proceeds of the vicarage. The defendants' title is under a judgment and sequestration of the year 1832, and before they obtained that judgment, they had notice of the plaintiff's title. The question, therefore, turns upon the validity of that title, and the remedy by which the plaintiff is entitled to enforce it.

Before advertng to the facts, which are relied upon as constituting the plaintiff's title, it is material to consider the state of the law as to charging ecclesiastical benefices.

This, by the statute of Elizabeth, was made illegal. But that statute was repealed by the Act 48 Geo. III. c. 84, which was passed in the year 1808; and so the law remained till the year 1817, when by the Act 57 Geo. III. c. 99, the charging ecclesiastical benefices was again prohibited. So that from 1808 to 1817, and consequently in the year 1811, when the security which constitutes the title of the plaintiff was executed, and in the year 1814, when Mr. Warrington obtained the vicarage of Leake, the property claimed to be affected by the security, there was no law prohibiting a clergyman from charging his ecclesiastical benefice.

The security under which the plaintiff claims is dated the 9th of August, 1811, at which time, Mr. Warrington was incumbent of a living in the city of London; and the deed is a grant, for a valuable consideration, of an annuity of 150*l.* to one James Cottle, for the life of Mr. *Warrington, with a power of entry and distress upon that living, to secure the annuity, and a grant of the revenue of it for 99 years, determinable with the incumbency of Mr. Warrington, with a power of sale and mortgage: and in the deed there was the following covenant, namely, that in case Mr. Warrington should at any time or times thereafter, be preferred or promoted to any other ecclesiastical benefice or benefices in lieu of or in exchange for, or in addition to his then vicarage and rectory, or his church or ecclesiastical preferment for the time being, he would, at his own costs and charges, within three calendar months next after such events should happen, fully charge the same benefice or benefices, with payment of the annuity of 150*l.*, and also demise the same to

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a trustee of Cottle's nomination, in the same manner, in all respects, as the vicarage and rectory, were thereby charged and demised, for securing the annuity; and that, in the meantime, the same benefice and benefices, should be charged and chargeable with and liable to the payment of the annuity of 150*l*. A memorial of this deed was duly enrolled, and no question is made, but that this instrument was at the time perfectly regular, and operative as a charge upon the living of which Mr. Warrington was at that time possessed. There was also a warrant of attorney to confess judgment as a further security, upon which judgment was entered up. In 1813 James Cottle assigned this annuity and all the securities to the plaintiff, and the annuity being in arrear, the then living of the grantor was sequestered under the judgment. In November, 1814, Mr. Warrington exchanged this living for the vicarage of Leake; and in 1815 that vicarage of Leake was sequestered under the same judgment for the benefit of the plaintiff, and to obtain payment of the arrears. It appears that this judgment was not registered in the county of York, and the defendants having *obtained a judgment of the year 1832 which was duly registered, and issued a sequestration upon it, against the vicarage of Leake, a contest arose in the Court of King's Bench, as to which judgment was to have the preference; that contest ended in the Court deciding in favour of the defendants, the appellants, and the plaintiff was thereupon ordered to pay to them what he had received from the vicarage, under his sequestration, since the date of the sequestration of the defendants.

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This proceeding established that, at law, and as between the two sequestrators, the defendant had the better title; but it could not affect the question whether the plaintiff had any equitable title to, or was entitled to any equitable charge upon the vicarage of Leake. It appears that in the year 1818, the plaintiff had procured Mr. Warrington to execute a deed, for the purpose of carrying into effect the covenant in the deed of 1811, by creating a formal legal charge upon the vicarage of Leake, to secure the annuity; but the Act 57 Geo. III. c. 99, having before passed, in the year 1817, that deed was clearly illegal and of no effect. The question then is, whether under

these circumstances, the plaintiff is entitled to any charge upon the vicarage of Leake, under the covenant and charge in the deed of 1811; for if he is, then, as the defendants had notice of that deed before they obtained their judgment, such charge must be preferred to that judgment.

It is first to be considered what would have been the plaintiff's title if the Act 57 Geo. III. c. 99, had not passed; and, secondly, what effect has that Act upon the plaintiff's title. If that Act had not passed, the plaintiff would have been entitled to a present equitable charge upon the vicarage of Leake, with a right to call upon Mr. Warrington to give him a legal charge upon it.

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There can be no doubt that a covenant to charge or dispose of, or affect lands hereafter to be acquired, operates in equity upon lands so afterwards acquired. [His Lordship here cited cases to establish this point, and continued as follows:] Upon that point there is, I think, no doubt; that is, that such a charge upon lands to be afterwards acquired, would have been good, to affect such after-acquired lands, against the party creating the charge. If that be so, the present question must be answered in the affirmative; and what remains to be considered is, does the Act 57 Geo. III. c. 99, prevent such equity from attaching upon and affecting the vicarage. The Act is not retrospective; it prevents any new charge from being created; but does it make void a charge by a deed of a prior date, declared to affect the vicarage in question, until such equitable charge shall be converted, in pursuance of the covenant, into a legal charge? Does the Act, by preventing the legal charge from being created, destroy the equitable lien? If so, it would have a retrospective effect, which it does not profess to have. Suppose the deed of 1811 had not contained any covenant to execute a legal charge upon any newly acquired benefice, but merely a proviso and agreement that any such newly acquired benefice should be charged and chargeable with, and liable to the payment of the said annuity, could it be doubted that upon Mr. Warrington becoming vicar of Leake in 1814, that benefice became equitably chargeable with the annuity? If so, can the covenant to make a legal charge destroy the equitable charge? Can the covenant

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for further and better assurance, destroy the assurance *actually executed? On the part of the defendants the appellants, this was hardly questioned; but it was contended that the covenant was all one, and that it amounted only to a covenant for a legal charge, which had become illegal before any attempt was made to enforce it. I am clearly of opinion, however, that this is not the true construction of the deed of 1811, and that there is an equitable charge independently of the covenant to execute a legal charge. It was then said for the defendants, that all equitable charges rest upon specific performance, and the right to have a legal charge. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds, to ask for a legal mortgage? I am, for this reason, of opinion, that the VICE-CHANCELLOR's judgment was correct in giving effect to this equitable charge, upon the vicarage of Leake, to secure the annuity. * * *

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It was lastly contended for the appellants that the Court will not appoint a receiver, except to provide for the ultimate relief at the hearing. But how can the appellants object to this, if the incumbent does not? The appellants, if properly postponed to the plaintiff's claim, have rather an interest in having the receiver continued to secure the payment of the prior incumbrance; but, independently of this objection, I am of opinion that this Court will, to secure an equitable incumbrancer, which the plaintiff is, take possession of the property charged, by means of its receiver, as is done by the decree. Accounts are to be taken, the priority of incumbrances is to be ascertained, monies received are to be paid into Court, further directions are reserved, and the receiver is continued; which I think perfectly regular.

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I am, therefore, of opinion that the appellants have altogether failed to shew any error in the decree. The appeal, therefore, must be

Dismissed with costs.

EDWARDS v. THE GRAND JUNCTION RAILWAY COMPANY (1).

(1 My. & Cr. 650—674; S. C. 7 Simons, 337; 1 Rail. Cas. 173; 6 L. J. (N. S.) Ch. 47.)

1836.
July 12, 16,
20.
Nov. 5.
—
Lord
COTTENHAM,
L.C.
[650]

Where a person acting on behalf of the subscribers to a railway, who were then soliciting a Bill in Parliament, for the purpose of forming them into an incorporated joint stock Company, entered into a contract with the trustees of a road, whereby it was stipulated, that in consideration of the trustees withdrawing their opposition in Parliament, and consenting to forego certain clauses of which they had intended to press for the insertion in the Act, a formal instrument to the effect of the clauses should be executed under the seal of the Company when incorporated; and the Bill was accordingly allowed to pass unopposed and without the clauses, an injunction was granted at the suit of the trustees, to prevent the Company from violating the provisions contained in the omitted clauses.

An agreement to withdraw or withhold opposition to a Bill in Parliament is not illegal; and a court of equity will enforce a contract founded on such a consideration.

An incorporated Company will be bound by the agreement of its individual members, acting before incorporation on its behalf, if the Company has received the full benefit of the consideration for which the agreement stipulated on its behalf; provided the agreement is not inconsistent with the purposes and objects which the Company was formed to carry out.

By a local Act of Parliament, certain persons therein named were appointed trustees of the turnpike roads between Liverpool, Prescot, and Warrington, in the county of Lancaster, and were thereby empowered to make, repair, and improve the roads, and demand and take certain tolls therein mentioned. The business of the trust was managed by monthly meetings of the trustees, and

(1) Similar decisions were pronounced by Lord COTTENHAM in other cases, viz., *Stanley v. Chester and Birkenhead Ry. Co.* (1838), 3 My. & Cr. 773, and *Lord Petre v. Eastern Counties Ry.*, 1 Rail. Cas. 462; and the same view was adopted by Lord CAMPBELL in *Eastern Counties Ry. v. Hawkes* (1855), 5 H. L. C. 331, 356, and by Lord St. LEONARDS in *Goody v. Colchester Ry. Co.*, 17 Beav. 132. But the principle was disapproved by Lord CRANWORTH and Lord BROUGHAM in a Scotch Appeal,

Caledonian, &c. Ry. Co. v. The Magistrates of Helensburgh, 2 Macq. 391, and again in *Preston v. Liverpool, Manchester, &c. Ry. Co.* (1856), 5 H. L. C. 605; 25 L. J. Ch. 421. These cases are collected and referred to by KINDERSLEY, V.-C., in *Earl of Shrewsbury v. North Staffordshire Ry. Co.* (1865) L. R. 1 Eq. 593, 35 L. J. Ch. 156, 13 L. T. 648, and in *Lindley on Companies*, 5th ed. pp. 150-153, where the principal case is discussed at some length. —O. A. S.

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by committees of their number, appointed at such meetings, and by William Rowson, who was the clerk and solicitor of the trust.

In the year 1832, John Moss, Robert Gladstone, Charles Lawrence, and others, determined to apply for an Act of Parliament to establish a Company for the purpose of making a railway communication between the towns of Liverpool, Manchester, and Birmingham. They accordingly raised subscriptions, and adopted the usual means for forwarding the undertaking. Moss and Lawrence were chosen two of the directors, and Messrs. Pritt, Clay, and Swift, of Liverpool, were appointed the solicitors of the proposed Company. Early in the year 1833, a Bill was brought into Parliament, having for its object to form the subscribers to the undertaking *into an incorporated joint stock Company; and an application was made, on their behalf, for the consent of the road trustees to the line of the proposed railway being carried under the Liverpool and Warrington turnpike road, at a place called Bank Quay, near Warrington; and this application having been taken into consideration at a monthly meeting of the trustees, was by them referred to a committee, consisting of Richard Edwards, Thomas Case, Bartholomew Bretherton, and John Clare, who were requested to negotiate on the subject with the directors of the Railway Company, as well with reference to the railway crossing the turnpike road, as with reference to a pecuniary compensation for the injury the road would sustain by such railway in the diminution of the tolls, and the prejudice consequently done to the creditors of the trust; and the committee was empowered, generally, to adopt such measures, either by opposing the Railway Bill in Parliament, or otherwise, to effect the object above referred to, as might seem expedient, in the event of their negotiations terminating unsatisfactorily.

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The negotiations which were accordingly opened between Mr. Case, on behalf of the trustees, and Mr. Moss, on behalf of the Company, with a view to an amicable adjustment of the matters in difference, having ultimately failed, measures were immediately taken by the trustees for a vigorous and effective opposition to the further progress of the Bill in Parliament. The Bill having then already passed through the House of

Commons, petitions to the House of Lords against it were prepared and signed by the trustees, and by the bondholders and creditors of the trust, and various clauses were also drawn which the trustees were desirous of having introduced into the Bill for the protection of their interests, and a communication was made to the Earl of Derby, then Baron Stanley, a member of the *House of Lords, who was himself one of the trustees, for the purpose of making his Lordship acquainted with the facts, and of soliciting him to present the petitions, and support the prayer of them by his vote and influence.

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In the meantime, however, on the 18th of April, 1833, a meeting took place between Messrs. Case and Rowson, on behalf of the trustees, and Messrs. Moss, Lawrence, and Clay, on behalf of the subscribers to the railway, when a draft of the clauses which had been so prepared, and which the trustees desired might be inserted in the Bill, was considered, and after several alterations had been made, was adopted and agreed to by the parties present.

The clauses, as altered, were as follows : “ And whereas the said railway will cross the turnpike road between Liverpool and Warrington, at or near a certain place called Bank Quay, in the township of Warrington, in the parish of Warrington, in the said County Palatine of Lancaster; be it therefore enacted, that in case the said railway shall be made under or across the said road under the authority of this Act, the same shall not be carried under the said turnpike road on the level, but shall be carried under the said turnpike road, and the said Company of Proprietors hereby incorporated shall, at their own expense, erect and build a good, firm, and substantial bridge of brick, stone, or iron over the said railway where the same shall cross the said turnpike road, with proper approaches thereto, upon which bridge the said turnpike road shall be made of good and sufficient materials, and executed in a good and workmanlike manner at the expense of the said Company, and to the satisfaction of the surveyor for the time being of the trustees of the said turnpike road; and the battlements of the said bridge shall not be less than four feet in height, and shall be *closed, and continued for not less than thirty yards on each side from the summit of such bridge; and the ascent of the

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road over such bridge, and the approaches thereto, shall not, in any case, be more than one foot in thirty feet; and the said road so to be made by the said Company as aforesaid shall be formed of such width as to leave a clear and open space between the fences of such road equal to the width of the present road there.

“And be it further enacted, that the said Company shall at all times for ever after the said bridge shall have been erected under the authority of this Act, keep the same and any future bridge to be erected in lieu thereof, and which shall be of the like dimensions, capacity, and materials as are hereinbefore mentioned in good, perfect, and complete repair, except only the roadway over such bridge which is (save as hereinafter mentioned) to be repaired by the trustees of the said road; and the said Company shall and will at all times hereafter, well and sufficiently repair, and make good all damage and injury which may arise or be occasioned by the said railway over the said bridge, for or by reason of any repairs or alteration of, in, or to the said bridge by the said Company; and in case of any want of repair to the said bridge, or to the roadway over the same in the event last aforesaid, and notice being given by the trustees of the said turnpike road, or their clerk, or treasurer, or any other person authorised by the said trustees to the said Company of Proprietors hereby incorporated, or to their clerk or treasurer for the time being, of any want of repairs to the said bridge, or to any bridge to be erected in lieu thereof, under the authority of this Act, or the roadway over the same in the event aforesaid, if the said Company of Proprietors hereby incorporated, shall not for the space of one calendar month after service of such notice, commence *such repairs, and proceed therein with all reasonable expedition until the same shall be completed, the said trustees may, in case they shall see fit from time to time, repair or rebuild the said bridge, and repair the roadway over the same, in the event aforesaid, as the case may require, and as the said trustees shall think necessary; and all the expenses thereof shall upon demand be repaid by the Company of Proprietors hereby incorporated, and to the said trustees or their treasurer for the time being, and in default of such payment any two or more of his Majesty's justices of the peace for the said County Palatine

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of Lancaster shall, and they are hereby required, on application by the said trustees, or their clerk, or treasurer for the time being, or of any other person authorised by the said trustees by warrant under the hands and seals of the said justices, to cause the amount of such expenses to be levied by distress and sale of the goods and chattels of the said Company of Proprietors hereby incorporated, and to be paid by the said trustees; rendering the overplus, if any, upon demand, after deducting the charges of making such distress and sale, to the Company of Proprietors hereby incorporated; and the said trustees shall and may sue for and recover the same against the said Company of Proprietors hereby incorporated, by action of debt, or on the case, in any of his Majesty's courts of record at Westminster, or in his Majesty's Court of Common Pleas for the County Palatine of Lancaster."

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At that meeting it was suggested by Mr. Moss that, as the Bill was then in the House of Lords, it would save time and expense to the Company, if the insertion of the proposed clauses were dispensed with by the trustees, and an undertaking were given that an agreement should be executed to the same effect; and Mr. Case having acquiesced in that suggestion, Mr. Moss *thereupon signed a memorandum at the foot of the draft, in the following words: "I, the undersigned John Moss, undertake to execute an agreement to the effect of these clauses so soon as the same is prepared, and to get the same confirmed under the seal of the Company intended to be incorporated as soon as circumstances will permit: this agreement being made on the express understanding that there shall not be any opposition to the Bill now in Parliament, either by the trustees of the roads from Liverpool to Warrington, or the mortgagees of the tolls on the said roads. And this agreement is to be void on my delivering to the said road trustees, or their clerk, the engagement of the intended Company to the same effect. JOHN MOSS. Liverpool, 18th April, 1833."

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Immediately below this memorandum Mr. Case wrote the following words: "I recommend the trustees to confirm the above agreement. THOMAS CASE."

At a meeting of the committee of the trustees, held on the

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20th of April, it was unanimously resolved, that the arrangement made by Mr. Case with Mr. Moss should be confirmed. On the same day the clerk of the trustees wrote to Messrs. Pritt, Clay, and Swift, apprising them of the fact; and he also transmitted to them, for perusal and approbation, the draft of a deed of covenants founded upon the clauses as settled and adopted by Mr. Moss; and he at the same time sent a letter to Lord Derby, informing his Lordship that such an arrangement had been that day made between the trustees of the road and Mr. Moss, on behalf of the Railway Company, as would render it unnecessary to present the petitions in opposition to the Bill. The petitions accordingly were not presented; the idea of procuring the insertion of the proposed clauses in the Bill was abandoned, and all opposition to the further progress of the Bill having *been withdrawn, the Bill received the Royal assent, and became an Act of Parliament on the 6th of May, 1833.

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The Act was intituled “An Act for making a Railway from the Warrington and Newton Railway at Warrington in the County of Lancaster, to Birmingham in the County of Warwick, to be called the Grand Junction Railway;” and John Moss, Robert Gladstone, Charles Lawrence, and other persons therein named, and all other persons and bodies politic and corporate who had subscribed, or should thereafter subscribe towards the undertaking; and their several and respective successors, executors, administrators, and assigns, were thereby incorporated by the name and style of “The Grand Junction Railway Company,” by which name they were authorised to sue and be sued, and they were authorised to make the railway, and the affairs of the Company were to be managed by directors; and it was thereby enacted, amongst other things, that where any bridge should be erected for carrying any public road over the railway, the road over such bridge should be formed, and should at all times be continued of such width as to leave a clear and open space between the fences of such road of not less than fifteen feet; and the ascent of every such bridge for the purpose of such public road, should not be more than one foot in thirteen feet; and a good and sufficient fence should be made on each side of every such bridge, which fence should not be less than four feet above the surface of such bridge.

Application was made shortly afterwards to Mr. Moss, who had now become a director of the incorporated Company, for the purpose of procuring through his means, according to the agreement, a deed of covenants under the Company's seal, embodying the clauses as settled and approved by him on the 18th of April. That gentleman, however, refused to comply *with the application, and nothing further was done in the matter, until the month of March, 1836, when the road trustees received information that the workmen of the Railway Company, in the execution of the railway, were proceeding to carry the turnpike road at Bank Quay over the railway, by means of a bridge or viaduct, the width of which, and of the approaches to which, did not exceed thirty feet, although the width of the turnpike road at that place was fifty feet.

The trustees thereupon filed the present Bill, on behalf of themselves and all other persons interested in the tolls levied upon the roads which were subject to the trust, against the Railway Company. The Bill stated the facts already set forth; and it charged, among other things, that the only other persons interested under the trust were certain bondholders or mortgagees who had a lien upon the tolls; and that the number of such persons, was so great, in consequence of settlement and otherwise, as to render it highly inconvenient, and, indeed, impracticable to make them parties to the suit.

The Bill prayed that it might be declared, that the contracting the width of the road at Bank Quay was a violation of the agreement and undertaking entered into by Moss, and that any departure therefrom was a fraud upon the plaintiffs; that it might be declared that the agreement of the 18th of April, 1833, was binding on the defendants, and that they might be decreed specifically to perform the same, and to execute a proper deed conformably thereto, and to restore the road to its former condition; and that the defendants, their agents, and workmen, might be restrained by injunction from continuing and proceeding with their present works on the road at Bank Quay, and from making or continuing any road at Bank Quay, which should not be of such *width as to leave a clear space between the fences of such road equal to the width of the road there at

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the time when the Act for incorporating the Company passed, and from making any bridge, road, or viaduct contrary to, or otherwise infringing the agreement of the 18th of April, 1833, or the clauses therein referred to.

The plaintiffs filed affidavits in support of the statements contained in their Bill; and those affidavits having been met by counter-affidavits made by Mr. Moss and other persons on behalf of the Company, the plaintiffs moved for an injunction in the terms of the prayer of the Bill.

The VICE-CHANCELLOR having granted the motion, the defendants now moved, before the Lord Chancellor, that the injunction might be dissolved.

In support of the motion, it was first contended, that in point of fact no final agreement had been ever entered into by Mr. Moss; but that the memorandum which he had signed was merely a proposal or treaty, which had never ripened into a contract, and from which, as it had not been definitely accepted by the trustees, he was at liberty to withdraw, and had in fact, as the trustees well knew, withdrawn, before the passing of the Railway Act. The grounds upon which this argument rested, and the effect of the affidavits by which it was supported, are stated and considered in the judgment.

[*659] *Mr. Jacob and Mr. Sharpe* further insisted, on behalf of the defendants, that even assuming the agreement to have been a final and binding contract as against Moss, a Bill could not be sustained upon it, seeking to charge the Company with the liability which the memorandum purported to create. The agreement was personal to *Moss, and did not profess in any way to affect the company; nor did Moss execute it as the agent, or on behalf of the Company. How indeed, was it possible that he should, seeing that the Company had then no existence? * * *Capes v. Hutton* (1). Even if the Railway Company had been in existence and incorporated, and Moss had been its authorised agent at the time when he executed the agreement, and had introduced into it words for the express purpose of charging his employers, his agreement would not be

(1) 26 R. R. 102 (2 Russ. 357).

legally binding upon them, unless they subsequently ratified his act, and affixed their corporate seal to the instrument: *Dunston and Clarke v. The Imperial Gas Light Company* (1). * * This was neither more nor less than an attempt, through the instrumentality of the Court of Chancery, to give the authority of law to provisions which had never received the sanction of the Legislature. * * *

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To enforce the agreement of Moss against the Railway Company, would be to sanction a fraud upon the present shareholders. The Bill was passed into a law without any reference to that agreement. * * Arrangements of this kind, if once sanctioned in a court of justice, would furnish a convenient cloak for every species of jobbing and fraud. * * The contest too, it was to be observed, lay not between individuals, but between corporate bodies; and so long as the rights of the public, who were alike interested in the road and the railway, were fully protected and secured, it signified little what were the rival claims of the contending parties. * * *

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Mr. Wigram and Mr. Walker, in support of the injunction:

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* * The Company had received the whole advantage which that agreement was intended or able to give to them; the arrangement had relieved them from the necessity of entering into a doubtful and expensive contest with the road trustees in Parliament, and the funds of the Company had of course been proportionably benefited. * * The equity of the present Bill was the common and well-established equity, so often asserted in the case of wills and marriage settlements, according to which a party, who upon certain terms procured the omission or suppression of a particular clause in an instrument, for his own advantage, was compellable specifically to perform his part of the contract, in other words, to pay the price by which that omission was purchased. * * *

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Mr. Jacob, in reply.

The LORD CHANCELLOR said, that as the contest here was between two public bodies, it was not impossible, and it was

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(1) 37 E. R. 352 (3 B. & Ad. 125).

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extremely desirable, that they might come to some arrangement which would relieve him from the necessity of deciding between them upon the question of right. He should therefore postpone his judgment for the purpose of affording to both parties an opportunity of entering into negotiations, with a view to a compromise.

The cause accordingly stood over during the Long Vacation; but the parties were unable to come to any arrangement; and judgment was now delivered by

Nov. 5.

THE LORD CHANCELLOR:

This was an application to dissolve an injunction granted by the VICE-CHANCELLOR, restraining the Grand Junction Railway Company from making a bridge or viaduct to carry the road of which the plaintiffs are trustees, over the railway, of less width than the other parts of the road, which at that place is fifty feet wide. Under the Railway Act a width of no more than fifteen feet is required. The defendants propose to make the bridge thirty feet wide, but the plaintiffs contend that the Railway Company are bound to make it fifty feet wide; and the plaintiffs support their case by shewing that whilst the Railway Bill was still before Parliament, the parties who were soliciting the Bill agreed with the plaintiffs, that the proposed bridge or viaduct should be fifty feet wide, and by so doing, induced the plaintiffs, the trustees of the road, to permit the Bill to pass without opposition.

[*668] It appears from the affidavits, that the plaintiffs, Edwards, Case, Bretherton, and Clare, were appointed a *committee of the trustees, to negotiate and conclude an arrangement with the projectors of the Railway Company upon this subject. Moss and Lawrence, two of the directors of the Company, had the principal management of their affairs, and Messrs. Pritt, Clay, and Swift were their solicitors. Mr. Rowson was solicitor to the plaintiffs.

On the 19th of March, 1833, the trustees instructed their committee to conclude an arrangement, if possible, and if not, to take measures for opposing the Bill in Parliament.

The affidavits state that, there being no prospect of an amicable

arrangement, preparations were made for opposing the Bill, and clauses were prepared which the plaintiffs wished to have introduced into the Bill, and a member of the House of Lords was applied to, to present their petition for that purpose. The affidavits then state, that on the 18th of April, 1833, a meeting took place at Liverpool between the plaintiff Case and Mr. Rowson on behalf of the trustees of the road, and Moss, Lawrence, and Clay, on behalf of the Railway Company, at which the proper clauses to be inserted in the Bill on behalf of the road trustees were discussed, altered, and finally settled, which clauses contained a variety of provisions, and amongst others, one that the bridge should be as wide as the road at that part, which is fifty feet; that thereupon Moss, on behalf of the Company, proposed, to save time and expense, that the object of the trustees, should be secured by an agreement, instead of clauses in the Bill, and that this proposal being assented to, he wrote and signed the agreement which is the foundation of the present suit. [His Lordship here read the words of the agreement signed by Mr. Moss, and also the memorandum written at the foot of it by Mr. Case. His Lordship then continued:]

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The only material fact upon which the affidavits differ, is whether the trustees of the road did adopt the arrangement so entered into by Mr. Case. The affidavit on their part states, that it was communicated to the other members of the committee, Edwards, Clay, Clare, and Bretherton, and that, some difference of opinion arising upon it, they agreed to meet at Liverpool on the 20th, and that notice of their intention was given by Mr. Rowson to Messrs. Pritt, Clay, and Swift, on the 19th of April, and a further communication promised, as soon as the committee should have made their determination. That a meeting was accordingly held on the 20th, at which Messrs. Case and Clare attended, (Edwards and Bretherton having signified their assent) when it was resolved to adopt the arrangement so conditionally agreed upon by Case on the 18th; and that on the same day, Mr. Rowson informed Messrs. Pritt, Clay, and Swift of this resolution, and sent to them a draft of covenants to the effect of the clauses; and that thereupon the petitions of the trustees and bondholders to Parliament were withdrawn. That on the 23rd or

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24th of April, Mr. Clay returned the draft with some suggestions as to alterations, saying that he had sent a copy to Mr. Swift and Mr. Moss in London, and would inform Mr. Rowson as soon as he heard from them; but that no subsequent answer was sent; and that the Bill, without the clauses, received the Royal assent on the 6th of May following. That nothing further passed upon the subject until the month of March, 1836, when it appeared that the Company were about to make a bridge only thirty feet wide, whereupon Mr. Rowson claimed the benefit of the contract for fifty feet, and then this contest commenced.

In answer to this statement, Mr. Moss, who is chairman of the Railway Company, has made an affidavit, stating that on the 19th of April, 1833, Mr. Case informed him that the other trustees refused to concur in *the arrangement, and that he (Moss) thereupon considered it as at an end, and therefore refused to look at the draft deed offered to him in London by Mr. Swift; and further that in March, 1836, Mr. Case again stated that there was no agreement, and that Edwards' letter to Rowson would shew that to have been the fact.

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Now this statement, it may be observed, is totally inconsistent with the fact of the trustees having agreed to meet on the 20th, to consider whether they should adopt the agreement, as well as with Mr. Rowson's letter stating that a meeting on the 20th had been appointed for that purpose. But supposing the conversation with Case to have taken place, Mr. Moss and Mr. Swift on the 22nd or 23rd of April received in London from Mr. Clay the draft of the proposed covenants, with Mr. Clay's suggested alterations. By this they were at all events informed that the trustees, so far from considering the arrangement as abandoned, relied upon its being carried into effect, and would necessarily upon that faith abstain from any opposition to the Bill in Parliament, and that their own agent, Mr. Clay, was acting under the same impression; and yet they did not communicate to the trustees their intention to treat the arrangement as abandoned, so as to give them an opportunity of opposing the future progress of the Bill, but left them in the belief that the interests of their trust were secured by the agreement, and the Company were thus enabled to carry the Bill without opposition through its subsequent

stages up to the Royal assent, which was given on the 6th of May.

Such would have been the state of the case if the statement in Mr. Moss's affidavit had remained unexplained; but Mr. Case has, by his affidavit of the 11th of June last, denied that he saw Mr. Moss on the 19th of April, 1833, and says that what Mr. Moss represents *as having passed between them related to a proposition made on the 11th, and not to that of the 18th of April, and took place at another time, and not on the 19th. Mr. Rowson has also made an affidavit in reply, stating that, after the proposal of the 18th of April, he used every exertion to communicate with the other members of the committee of the trustees, and that the meeting of the 20th having been regularly convened, it was at that meeting unanimously agreed to confirm the proposal of the 18th, a fact of which he immediately gave Mr. Clay notice.

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Under these circumstances I cannot hesitate to come to the conclusion, that the agreement entered into by Mr. Moss on the 18th of April, 1833, which was conditional upon its being accepted by the committee of the trustees, became absolute by their acceptance and confirmation of it. The only question, therefore, to be considered is, whether it was afterwards abandoned, or whether the defendants, the Railway Company, can be heard to say that they are not to be affected by what so took place before the passing of their Act of Parliament.

With respect to the abandonment, all these transactions, it is true, took place in the year 1833; but the Railway Company did nothing until the year 1836 to rouse the activity of the road trustees. The latter trusting, as they well might, that the question between the road and the railway had been finally settled, and that whenever the Railway Company should be in a condition to cross their road, the terms of the agreement would be adhered to, had no longer anything to discuss with the Railway Company; and it appears that they did insist upon the performance of the contract as soon as they had any reason to suppose that the Railway Company intended to construct the bridge or viaduct in a manner inconsistent with the provisions of the agreement.

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But then the Railway Company contend that they, being now a corporation, are not bound by any thing which may have passed, or by any contract which may have been entered into by the projectors of the Company, before their actual incorporation.

If this proposition could be supported, it would be of extensive consequence at this time, when so much property becomes every year subjected to the power of the many incorporated companies. The objection rests upon grounds purely technical, and those applicable only to actions at law. It is said that the Company cannot be sued upon this contract, and that Moss entered into a contract, in his own name, to get the Company when incorporated, to enter into the proposed contract. It cannot be denied, however, that the act of Moss was the act of the projectors of the railway: it is therefore the agreement of the parties who were seeking an act of incorporation that, when incorporated, certain things should be done by them. But the question is, not whether there be any binding contract at law, but whether this Court will permit the Company to use their powers under the Act, in direct opposition to the arrangement made with the trustees prior to the Act upon the faith of which they were permitted to obtain such powers. If the Company and the projectors cannot be identified, still it is clear that the Company have succeeded to, and are now in possession of all that the projectors had before; they are entitled to all their rights, and subject to all their liabilities. If any one had individually projected such a scheme, and in prosecution of it had entered into arrangements, and then had sold and assigned all his interest in it to another, there would be no legal obligation between those who had dealt with the original projector and such purchaser; but in this Court it would be otherwise. So here, as the Company stand in the place of the projectors, they cannot repudiate *arrangements into which such projectors had entered; they cannot exercise the powers given by Parliament to such projectors, in their corporate capacity, and at the same time refuse to comply with those terms, upon the faith of which all opposition to their obtaining such powers was withheld. The case of *The East London Water Works Company v. Bailey* (1)

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(1) 4 Bing. 283 [overruled, *South of Ireland Colliery Co. v. Waddle* (1868) L. R. 3 C. P. 463, 4 C. P. 617].

was cited to prove that, save in certain excepted cases, the agent of a corporation must, in order to bind the corporation, be authorised by a power of attorney; but it does not therefore follow that corporations are not to be affected by equities, whether created by contract or otherwise, affecting those to whose position they succeed, and affecting rights and property over which they claim to exercise control. What right have the Company to meddle with the road at all? The powers under the Act give them the right; but before that right was so conferred, it had been agreed that the right should only be used in a particular manner. Can the Company exercise the right without regard to such an agreement? I am clearly of opinion that they cannot; and having before expressed my opinion that the contract is sufficiently proved, it follows that the injunction granted by the VICE-CHANCELLOR is in my opinion proper, and that this motion to dissolve it must be refused with costs.

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The case of *The Vauxhall Bridge Company v. Earl Spencer* (1) was cited for the trustees; and it certainly is a strong authority in favour of their claim; Lord ELDON having in that case expressed an opinion, that the withdrawing opposition to a Bill in Parliament might be a good consideration for a contract, and having recognised the right of an incorporated company to connect itself with a contract made by the projectors of the company, *before the act of incorporation. On the other hand *Dance v. Girdler* (2) was cited for the Railway Company; but that was an attempt to make a surety liable beyond his contract; and Sir JAMES MANSFIELD, in his judgment in that case, relied much upon the want of identity between the society with whom the contract was made and the corporation; and the question there was as to a legal liability, not as to an equitable right.

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It was contended for the Railway Company that, to enforce this equity would be unjust towards the shareholders of the Company who had no notice of the arrangement. To this two obvious answers may be made; first, that the Court cannot

(1) Jac. 64; in which case nothing was finally determined. The legality and validity of certain bonds given by the promoters of a company to induce the withdrawal of opposition

to their Bill was directed to be tried at law.—O. A. S.

(2) 8 R. R. 748 (1 Bos. & P. N. R. 34).

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recognise any party interested in the corporation, but must look to the rights and liabilities of the corporation itself; and, secondly, that there is nothing in the effect of the injunction inconsistent with the provisions of the Act; for although the Act provides that bridges shall not be less than fifteen feet in width, it does not provide that they shall not be made wider. The Company might under this Act clearly agree that this or any other bridge should be fifty feet wide.

It cannot be necessary to observe upon the alleged admission of Mr. Clare that there was no agreement. Mr. Clare could not release or destroy the agreement if it in fact existed; and he explains the circumstance by shewing that he was under a mistake. Neither can it be of any importance that Mr. Edwards on the 19th of April was not prepared to agree to the proposal. That gentleman did agree that a meeting of the trustees should be had for the purpose of coming to a decision; and although he did not attend that meeting, he did not, and could not, dispute the power of those present to come to a final decision; and he by his affidavit states, that he did himself assent to the proposed arrangement.

1886.
July 20.

Lord
COTTENHAM,
L.C.
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BIGGS v. TERRY (1).

(1 My. & Cr. 675, 676.)

Order made that an infant ward of Court might be at liberty to go abroad for a short period, to visit his father, on satisfactory security being given that he would be restored to the jurisdiction within a limited time.

THIS was the petition of an infant ward of Court, of the age of eighteen years, praying that he might be permitted to go abroad for three weeks, in company with a gentleman named in the petition, for the purpose of seeing his father, who resided at Boulogne, and that the sum of 30*l.* might be ordered to be paid to the petitioner or his companion for the expenses of the journey.

(1) *Re Callaghan, Elliott v. Lambert* (1884) 28 Ch. Div. 186, 54 L. J. Ch. 292, 52 L. T. 7.

Mr. Wakefield, in support of the application, referred to the affidavits, from which it appeared that the infant had not seen his father for a considerable time; that the father was then suffering under a dangerous malady, from which he was not likely to recover, and that he was consequently unable to come to this country to see his son. A friend of the petitioner's family, who, it was proposed, should accompany the petitioner on the journey, was prepared to give reasonable security that the infant should return to England within any period which the Court might limit.

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Mr. Wigram, on behalf of the trustees of the infant's property, opposed the application, and stated that the plaintiff's father was in insolvent circumstances, and while he remained in England had been repeatedly arrested, so that other reasons might probably be suggested, as well as the state of his health, why he was unable to come and see his son at home. The whole property of the infant had come to him from his maternal relatives.

The LORD CHANCELLOR made the order: *Mr. Hodges*, the gentleman by whom the infant was to be accompanied, *giving security to the satisfaction of the Master, that the infant should be brought home within three weeks; the trustees to be at liberty to retain the reasonable expenses of the infant's journey in their accounts.

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IN THE KING'S BENCH.

1835.

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WILLIS AND ANOTHER, ASSIGNEES OF NORCLIFFE, A
BANKRUPT, v. THE GOVERNOR AND COMPANY
OF THE BANK OF ENGLAND.

(4 Adol. & Ellis, 21---30; S. C. 5 N. & M. 478; 1 H. & W. 620; 5 L. J. (N.S.) K. B. 73.)

Giving cash for a bank post bill is a payment within the protection extended by stat. 6 Geo. IV. c. 16, s. 82 (1), to "all payments really and *bonâ fide* made" to any bankrupt before the commission.

N. committed an act of bankruptcy, and on the same day absconded with two 500*l.* bank post bills drawn in London, payable to himself, which he afterwards indorsed in blank. At Gloucester, where a branch bank of the Bank of England is established under stat. 7 Geo. IV. c. 46, s. 15, he delivered the bills to S., saying he wanted gold for them. S., who was known at the branch, delivered them to the agent there, and received 1,000*l.* in gold, first indorsing them, at the agent's desire, to the Governor and Company of the Bank of England. S. paid over the whole 1,000*l.* to N., having no interest in the bills, and having acted merely as his friend and agent. The commission had not then issued. Neither S. nor the Bank agent knew of the act of bankruptcy. The bills were sent to the Bank of England from the branch, uncanceled. The practice at the branch banks, when bills are changed there, is, to take an indorsement and send them up uncanceled: Held,

First, that the delivery of the 1,000*l.* to S. for the bills was a transaction between the Bank of England and N. the bankrupt, by their respective agents.

Secondly, that the changing of the bills, whether considered as a purchase of them, or as a payment in discharge of the liability of the Bank, was not a valid transaction, unless protected by sect. 82 of the Bankrupt Act, as a payment made without notice of an act of bankruptcy.

N. absconded (as above stated) March 12th. Application was made by solicitors on the 16th to the Bank of England, to stop the bills, describing them, and stating that N. had absconded with them. On the 8th of April the same solicitors again applied at the Bank to the same effect, and it was then stated that a fiat of bankruptcy against N. was expected by every post. The bills were changed at Gloucester, April 12th:

Held, that there was sufficient notice to the Bank to take away the protection of 6 Geo. IV. c. 16, s. 82; and that such notice to the Bank operated as notice to the branch bank, a reasonable time having elapsed for transmitting it before the bills were received there from S.

TROVER for three bank post bills. Plea, the general issue. At the trial before Alderson, B. at the Lancaster Spring

(1) See now the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52, s. 49).—R. C.

Assizes, 1834, the plaintiffs had a verdict for 1,500*l.*, subject to the opinion of this Court on the following case :

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Charles Norcliffe, before his bankruptcy, carried on trade at Liverpool as a dealer in zinc. On the 2nd of March, 1833, Messrs. Blackstock and Bunce, solicitors in London, received on account of the said C. Norcliffe 1,600*l.*, which, on the same day, they paid to the Bank of England, and obtained from the Bank three bank post bills for 500*l.* each (which are those in question), and one for 100*l.*, all dated March 2nd, 1833, payable to *Norcliffe or his order, at seven days' sight, and accepted by the Bank at the time they were issued (1).

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On the same day, the bills were remitted by Blackstock and Bunce to Mr. Grace at Liverpool, then the attorney of Norcliffe, who on the 4th March paid them over to Norcliffe. On the 12th March, 1833, Norcliffe absconded from Liverpool, and committed an act of bankruptcy on that day. On the 16th, Messrs. Blackstock and Bunce, in consequence of instructions from Liverpool, applied to the Bank of England in London to stop the payment of the bank post bills, and informed the Bank that Norcliffe had absconded from his creditors with the bank post bills in question ; whereupon an entry of such application was made by the defendants in their books in the following terms, which entry was seen at the time by the clerk of Messrs. Blackstock and Bunce who made the application :

“ Messrs. Blackstock and Bunce, 18, Serjeants' Inn, Fleet Street, solicitors, on behalf of Robert Grace of Liverpool, apply to stop payment of the four following bank post bills with which Charles Norcliffe of Liverpool has absconded, viz. :

“ No. M. 7040 to Charles Norcliffe 500*l.*”

(Similar descriptions were given of the other three bills.)

(1) The bills were in the following form :

Bank Post Bill.
No. M. 7042. London,
2nd March, 1833.

At seven days' sight, I promise to pay this my sola bill of exchange to Charles Norcliffe, Esquire, or order, five hundred pounds sterling, value

received of Messrs. Blackstock & Co.

Accepted, 2nd March, 1833.

H. BRENT.

For the Governor and Company
of the Bank of England.

T. NEEDHAM.

£500. T. S.

Entd. M. R.

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On the 8th of April the bill for 100*l.* was presented at the Bank by a Mr. Graves; but payment was withheld, in consequence of the stop, on the indemnity of Messrs. B. and B., and the holder was referred to them; but they ultimately paid Mr. Graves the amount of his claim upon the 100*l.* bill, and the Bank, with Graves's consent, paid the amount of the bill to Messrs. B. and B. as agents of Norcliffe's assignees. On the same 8th of April, the defendants were again informed by Messrs. B. and B. that Norcliffe had absconded with the bills, and were also told by them that the necessary documents for a fiat of bankruptcy against Norcliffe were then expected by every post, and they were again requested not to part with the 100*l.* bill; and accordingly the defendants withheld the payment on the said indemnity of Messrs. B. and B.

The said Charles Norcliffe was acquainted with a Mr. Smallridge, an attorney and proctor at Gloucester, who had transacted business for him as his attorney some time before, Norcliffe having formerly kept an inn at Stroud in Gloucestershire. Norcliffe, on the 12th of April, 1833, applied to Smallridge, and explained to him that he wanted 1,000*l.* in gold, to pay off a mortgage, in exchange for two of the bank post bills he then produced, which were two of the bills the subject of the present action.

Mr. Smallridge, on the same 12th of April, applied to the agent for the Bank of England branch at Gloucester for 1,000*l.* in gold, in exchange for the said two bank post bills. Smallridge was known to the agent, who gave him 1,000*l.* in gold in exchange for the two bills. Smallridge immediately afterwards handed over the 1,000*l.* in gold to Norcliffe. Smallridge was examined *as a witness for the plaintiffs at the trial, and stated that he gave no value for the bills, and had no interest in them, but handed the whole amount of the proceeds over to the bankrupt without any deduction, and that he acted merely as the friend and agent of Norcliffe in the transaction. The two bills so changed at Gloucester were indorsed in blank by the bankrupt some time after the 12th of March, and before he delivered them to Mr. Smallridge, but at what precise period did not appear. On applying for change, Smallridge was required by the agent

[*24]

of the branch bank to indorse the bills, and he did so before receiving the cash, as follows: "Pay the Governor and Company of the Bank of England. C. SMALLRIDGE." At the time of this transaction, Smallridge did not know that Norcliffe had absconded from his creditors or committed an act of bankruptcy.

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The said two bank post bills were, in the usual course of business, remitted by the said agent of the Governor and Company of the Bank of England at Gloucester, to the Bank of England, on the 16th of April, 1833, and the Governor and Company gave notice thereof to Messrs. B. and B. by the following letter:

"SECRETARY'S OFFICE, Bank of England.

17th April, 1833.

"GENTLEMEN,

"The bank post bills for 500*l.* each" (mentioning the numbers and dates), "stated by you to have been embezzled, were this day presented at the Bank for payment; and, upon application at this office, you will be furnished with the particulars of the information collected as to the holder of the bills. The Governor and Directors of the Bank of England cannot engage to withhold payment of the bills, unless they are furnished by *you (and that immediately) with evidence to impeach the title of the holder. I am," &c.,

[*25]

"M. B. SAMPSON."

The bills when remitted to London were not cancelled. Bank post bills changed at the branches are required to be indorsed, and are not cancelled at the branches. Such bank post bills frequently circulate about the country as cash for a very considerable period, and they have a great circulation.

On the 11th of April, 1833, the said C. Norcliffe applied to Messrs. Tugwell & Co., bankers at Bath, to whom he was known, having some time before had an account with them as bankers, to change the third bank post bill for 500*l.* (No. 7041), also the subject of the present action. Tugwell & Co. gave him cash for the same; and Norcliffe thereupon indorsed the said bill in the banking-house of Tugwell & Co. and delivered it to them. Tugwell & Co. afterwards paid away the bill for value to Messrs.

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Smith and Moger of Bath, and they afterwards paid the same for value to one Lathbury. The case then stated various transfers of this bill for value, in the course of which (April 22nd) it came a second time to the hands of Tugwell & Co. for value; was again paid away for value by them; and, ultimately, was paid (May 29th), by one W. Templeton, to a clerk of the Bristol Bank of England branch, as cash to be remitted to his Majesty's Exchequer, on account of the collection of the taxes; and the Bank of England gave the Exchequer credit for the amount. The last-mentioned bill was remitted in the usual course of business, on the 31st of May, 1833, by the branch bank at Bristol to the said Governor and Company, who *thereupon gave notice thereof to Messrs. Blackstock and Bunce by a letter to the same effect as that already set forth.

[*26]

On the 18th of April, 1833, a fiat in bankruptcy was issued against Norcliffe, under which he was duly found and declared a bankrupt, and the plaintiffs were duly appointed his assignees. And the case stated a demand and refusal of the three bills before action brought.

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover the three bank post bills for 500*l.* each, or any of them, from the defendants. The case was argued in last Trinity Term (1).

* * * * *

[36]

LORD DENMAN, Ch. J. in this Term (November 23rd) delivered the judgment of the Court :

This was an action of trover to recover three bank post bills for 500*l.* each, all of which were in the possession of Norcliffe, the bankrupt, at the time when he committed an act of bankruptcy by absconding on the 12th of March, 1833, and all of which he disposed of after the act of bankruptcy, and before the issuing of the fiat for the commission, which took place within two months from the act of bankruptcy, viz. on the 18th of April.

On the 16th of March notice was given to the Bank of England, in London, that the bankrupt had absconded from his

(1) June 5th. Before Lord Denman, Ch. J., Littledale, Patteson, and Williams, JJ.

creditors with the bills. And on the 8th of April further notice was given to the Bank of England, in London, that the necessary documents for a fiat in bankruptcy against Norcliffe were expected by every post.

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One bill was passed by the bankrupt on the 11th of April to Messrs. Tugwell & Co., bankers at Bath, who gave cash for it, and from them it passed through several other hands, and, ultimately, came to the Bank of *England branch bank at Bristol, on the 29th of May, 1833.

[*37]

Messrs. Tugwell & Co. had no notice of any act of bankruptcy committed by Norcliffe, and, with respect to the bill passed to them, the only question is, whether the case comes within the 82nd section of 6 Geo. IV. c. 16, as a payment *bonâ fide* made to the bankrupt, and, therefore, valid. Now, the cases of *Cash v. Young* (1) and *Hill v. Farnell* (2) have established the position, that a purchase of goods for ready money paid at the time comes within that section; and we see no reason why the taking a bank post bill for which cash is given at the time should not be equally within the same section. Messrs. Tugwell & Co., therefore, acquired a property in the bill, and could pass the same to others: it follows, that the plaintiffs cannot maintain this action as to that bill: and, indeed, that point seems to have been conceded in the course of the argument.

The other two bills were delivered by Norcliffe indorsed in blank to Mr. Smallridge at Gloucester, on the 12th of April, in order that he might obtain cash for them from the Bank of England branch bank at Gloucester, Mr. Smallridge being acquainted with the agent of the Bank of England there. Smallridge obtained cash for the bills from the branch bank, and, by direction of the agent there, indorsed the bills, "Pay the Governor and Company of the Bank of England. C. SMALLRIDGE." Smallridge, however, was merely agent for Norcliffe, to whom he immediately handed over the cash, and had no interest of any kind in the bills: he had no notice of any act of bankruptcy committed by Norcliffe, nor had the agent at Gloucester.

(1) 2 B. & C. 413.

(2) 9 B. & C. 45.

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It is contended, and we think rightly, that these bills were not presented for payment to the branch bank; for, though the 7 Geo. IV. c. 46, s. 15, requires that bank post bills issued by the branch banks shall be payable there, as well as in London, yet the converse is not enacted, and bank post bills issued in London are not payable at the branch banks. They were presented, as they might have been to any other bankers, asking for change. Still the question is, to whom were they presented and delivered at Gloucester? and the answer is undeniable, that they were presented and delivered to the Bank of England (the defendants) at Gloucester, not to the individual who was their agent there, as an individual. The Bank of England carry on the business at Gloucester by the agent, who, in the terms of 7 Geo. IV. c. 46, s. 15, was carrying on the banking business there "for and on behalf of the said Governor and Company:" the money paid for the bills was the money of the Bank of England, and the bills were indorsed to the Bank of England. The transaction at Gloucester took place therefore between the defendants by their agent on the one hand, and Norcliffe by his agent (Smallridge) on the other. Independently of the eighty-second section of 6 Geo. IV. c. 16, no property in the bills would pass to the defendants from Norcliffe, on account of the previous act of bankruptcy. And the payment by the defendants to him, whether made by way of purchase of the bills, or by way of discharging their liability as acceptors, can only be protected under the eighty-second section, provided they had no notice of any act of bankruptcy committed by him.

[*39]

This reduces the case to the question, what was the effect of the notices given to the Bank of England *in London? We are clearly of opinion that those notices, taken together, even if any doubt could be raised as to the first, amount to notice of an act of bankruptcy committed by Norcliffe. The general rule of law is, that notice to the principal is notice to all his agents, *Mayhew v. Eames* (1); at any rate, if there be reasonable time, as there was here, for the principal to communicate that notice to his agents, before the event which raises the question happens.

(1) 27 R. R. 427 (3 B. & C. 601).

Considering that direct notice was in this case given to the defendants themselves of the bankruptcy of the holder of the bills, we steer clear of the doctrine (lately much disputed) of negligence or imprudence in the party receiving negotiable instruments for consideration, and without fraud.

We have been pressed with the inconvenience of requiring every trading company to communicate to their agents everywhere whatever notices they may receive; but the argument *ab inconvenienti* is seldom entitled to much weight in deciding legal questions; and, if it were, other inconveniences of a more serious nature would obviously grow out of a different decision.

For these reasons we are of opinion that the plaintiffs are entitled to recover the value of two of the bills in question, but not of the third; and the verdict must be reduced to 1,000*l*.

*Verdict to stand for 1,000*l*.*

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REX v. THE INHABITANTS OF WOKING (1).

(4 Adol. & Ellis, 40—52; S. C. 5 N. & M. 395; 1 H. & W. 539; 5 L. J. (N. S.) M. C. 17.)

1835.

[40]

By a local Act, the soil of a river was vested in trustees of a navigation, who were to receive the profits of such navigation, and apply them in the first instance in repairs and amendments, and in keeping the river navigable, &c. By the same Act, confirming certain articles of agreement, it was provided that M. should receive, out of the profits of the said navigation, so much for every ton, &c., navigated on the river, and that D. should receive so much for every ton navigated on the said river within his own land situate in the parish of S. And that the trustees should pay to the persons to whom any shares of the profits should be allotted, in the manner provided by the Act, such respective shares yearly, after deducting the costs of repairing and amending the premises, and executing the trusts. Satisfaction for damage to lands, &c., by cutting passages or heightening the waters, was to be paid by the trustees out of the profits of the navigation, before the persons entitled to shares of the profits should receive such shares.

Tolls were taken as follows: On vessels using the whole line of the navigation, 4*s*. Between a certain point above the parish of W., and the beginning of W., 3*s*. From the beginning to the end of W. (and to a point below), 2*s*. 6*d*. From thence to the lower end of the navigation, 2*s*.: Held,

1. That the poor-rate payable by the trustees for the part of the

(1) See *Rex v. The Earl of Portmore*, 25 R. R. 505 (1 B. & C. 551).

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navigation in W. was to be estimated, not by the increase of toll taken within W., but by a mileage calculation, the gross amount of toll upon any voyage including W. being distributed evenly over the line travelled, and the amount payable by W. being calculated by the proportion which the length of navigation in W. bore to the whole of the line travelled, whether the voyage extended over the whole length of navigation, or a part of it, including W.

2. The expense of repairs being equal through the whole line, that the amount of such repairs was to be deducted on a like mileage calculation.

3. That, in estimating the rateable profits, the compensations to M. and others were not to be deducted. And this, even in the instance of compensation for injury to a mill situate within the parish of W.

4. Also (on the assumption that lands in W. were rated at rack-rent and no more), that ten per cent. was to be deducted from the rateable amount, for the tenant's profit.

By a rate for the relief of the poor of the parish of Woking in Surrey, the Earl of Portmore and John Stephen Langton, Esquire, were rated, as proprietors of the river Wey navigation, on 325*l.*, at the sum of 16*l.* 5*s.* They appealed to the Sessions on the grounds, that they were not liable to be rated, and that they were over-rated, and the Sessions allowed the appeal, subject to the following case.

[*41]

By stat. 22 & 23 Car. II. c. 26, private, "for settling and preserving the navigation of the river Wey," the river was declared navigable, and the soil of the *river, and so much of the banks as extended on any side of any cut made since 1650, and the locks, sluices, towing-paths, wharfs, &c., were vested in trustees, who were "to receive the profits of the said navigation, and apply them in the first place in and towards the reparation and amendments of the said river, banks, sluices, dams, tumbling bays, and premises, used for and in order to the navigation of the said river, and for making and continuing the same navigable, and for servants' wages to be by them employed in and about the premises, and for the management thereof," and to dispose of the residue as was after directed; and they were authorised (under certain restrictions) to remove, alter, and amend all impediments, &c., to the navigation.

By the same Act, confirming certain articles of agreement, it was provided that Lord Montagu, his heirs, executors, &c. "should receive out of the profits of the said navigation 2½*l.*

for every ton, chaldron, or load navigated on the said river;" that Thomas Dalmahoy, his heirs, executors, &c. should receive 4*l.* for every ton, chaldron or load navigated on the said river within his own land, situate at Depdeene, in the parish of Stoke, next Guildford, besides 20*l.* per annum for a wharf, situate in the same parish; and that the corporation of Guildford should receive 1*l.* for every ton, &c., navigated on the said river or any part thereof. And that the trustees "should pay to the person or persons to whom any share or shares of the profits of the said navigation should be allotted respectively, in the manner provided by the said Act, and his or their heirs and assigns, such respective parts and shares of the clear and neat profits of the said navigation yearly and every year *for ever, after deducting of the costs, charges, and expenses of the repairing and amending of the said premises, and executing the trusts in the said trustees reposed." And further that certain recompense and satisfaction should be appointed, to be paid out of the profits of the navigation to any person who had received damage in his lands or tenements by the cutting of passages or heightening of waters in order to the navigation of the river; and that the satisfaction so allotted should be paid out of the profits of the navigation, before the respective persons to whom such shares of the profits of the said navigation should be allotted should be admitted to receive their respective shares of the said profits.

The Act provided that the river should not be navigated without the leave of the trustees, and empowered them to take from the owners of vessels "passing upon the river or any part thereof, the sum of 4*s.* for every chaldron of coals, and 4*s.* for every load or ton of corn," &c., and so after that rate for a greater or less quantity. The following tolls have been fixed by the present trustees:

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[*42]

	<i>s.</i>	<i>d.</i>
"Between Guildford Wharf and the river Thames . . .	4	0
Between Depdeene Wharf and the river Thames . . .	4	0
Between Stoke and the river Thames	3	6
Between Bowers and the river Thames	3	0
Between Triggs, or Send Heath, and the river Thames	2	6
Between Newark and the river Thames	2	0

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And so on according to the distances, with similar rates, decreasing in the same proportion, from the Thames to Guildford.

Triggs is in the parish of Woking, and Send Heath is in the parish of Ripley (1); and that part of the navigation which is in the parish of Woking extends from a spot between Bowers and Triggs to a spot between Triggs and Newark. If the increased toll is considered to be earned for the use of the navigation between the points above named, then the sum of 3*d.* per ton is payable in respect of that part of the navigation situate in the parish of Woking.

There are no toll-houses or paying-places on the river, but the entire tolls for the whole navigation performed are paid at once.

The whole length of the navigation is 27,060 yards: the length in Woking parish 4,049 yards.

Upon an average of the last three years,

The gross receipts for the tonnage upon the navigation are	£5923	16	10
Gross receipts, deducting for tonnage not passing through Woking	4705	12	6
The latter sum is made up of			
Receipts of the thorough trade (going the whole line of the navigation)	4811	18	1
The short trade passing through Woking	398	19	5
	£4705	12	6

[*44]

The share of Woking in the gross receipts for the whole tonnage of the *navigation, upon a mileage calculation, is	£886	9	11
Share in such gross receipts, deducting for tonnage not passing through Woking, upon a mileage calculation	688	14	2½
That is,			
Woking's share of the thorough trade	£630	5	4½
— of the short trade	58	8	9½

(1) On the side of the river Wey opposite to Woking.

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The share of Woking in the tolls upon a calculation of 3*d.* per ton, being half the 6*d.* rise for Triggs and Send Heath, according to the scale set forth in the case, for every ton passing Woking, is £309 0 0

Then followed an estimate (on the same average of three years) of

The general expense of the navigation, exclusive of compensations £2566 19 4

The compensations, viz., to Mr. Dalmahoy, to the Corporation, to Lord Montagu; and for mills (one only in the parish of Woking); amounting in the whole to 1226 8 0

The expenses of the navigation in Woking were stated to equal the expenses in the other parts of the navigation, regard being had to comparative length.

The share of Woking in the whole expenses, exclusive of compensations, on a mileage calculation, was stated at £384 2 10

Share in the compensations, on the like calculation 183 9 10 [45]

The net income of the navigation, on an average of three years, is 2230 14 6

The share of Woking in the net profits, upon a mileage calculation, without deduction . . . 333 16 10

Ten per cent. would be a reasonable deduction from the net income for tenants' profit, leaving 2007 13 1

Share of Woking after such deduction . . . £300 8 10

The questions for the opinion of this Court were—First, whether the sum in which the appellants are liable to be rated by Woking is to be ascertained by the proportion which the length of the navigation in Woking bears to the whole length thereof; and, if so, what deductions are to be made from that sum.

Secondly, whether the sum in which the appellants are to be rated, is to be ascertained by the amount of tonnage on all goods

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carried through Woking, at the rate of 3*d.* per ton ; and, if so, what deductions are to be made from that sum.

If the Court should adopt the first mode of ascertaining the amount of rate, the appellants claimed to make the following deductions from the amount (88*l.* 9*s.* 11*d.*) stated as the share of Woking in the gross receipts for the whole tonnage, upon a mileage calculation.

- [46]
1. Tonnage not passing through Woking (thereby reducing the share, as before stated, to 688*l.* 14*s.* 2½*d.*) £197 15 8½
 2. Share in the general expenses on a mileage calculation, excluding compensations . . . 384 2 10
 3. Share in compensations, on the same calculation 183 9 10

The last two sums were to be deducted from 688*l.* 14*s.* 2½*d.* And from the residue, after such deduction (121*l.* 1*s.* 6½*d.*), the appellants claimed further to deduct,

4. Tenants' profit, 10 per cent. 12 2 0
- Leaving, as the sum on which the appellants were to be rated 108 19 6½

If the Court should adopt the second mode of ascertaining the amount of rate, and should hold that the gross receipts applicable to Woking were to be calculated at 3*d.* per ton on all goods carried through Woking, the appellants claimed to make from the sum produced by such calculation the second, third, and fourth of the above deductions: in which case the deductions would exceed the receipts. The respondents denied that any of the above deductions could be made.

This case was argued in Hilary and Easter Terms, 1835 (1).

* * * * *

[50] LORD DENMAN, Ch. J., in this Term (November 25th) delivered the judgment of the COURT :

The rule by which canal companies are to be rated is laid

(1) January 24th, before Lord Denman, Ch. J., Littledale and Williams, JJ. ; and (the argument having been adjourned) April 25th, before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

down in the case of *Rex v. Kingswinford* (1) in these words: "The true principle is this: a canal company is to contribute to the relief of the poor in each parish through which the canal passes in proportion to the profit which they derive from the use of their land in that parish." It is also truly observed, in the same judgment, that, if the traffic be the same through the whole line of the canal, every part of the canal will earn an equal proportion of the tolls. On the other hand, that, if the profit vary in different parishes, the rate also must vary.

Apply that principle to the present case. The thorough trade pays one gross sum for the whole line, and all parts of the line are equally profitable: the proportion of the parish of Woking must, therefore, be ascertained by a mileage calculation, with reference to the whole line. Again, the short trade, as it is called, *pays one gross sum for the whole distance gone over, and all parts of that distance are equally profitable: the proportion of the parish of Woking must, therefore, be ascertained by a mileage calculation, with reference to the whole distance gone over. The tolls earned by passing over parts of the canal which do not include the parish of Woking will be wholly excluded.

[*51]

By the facts found in the case, the true proportion of the parish of Woking in the gross receipts, according to this calculation, is 688*l.* 14*s.* 2½*d.*

The next question is, what deductions, if any, ought to be made from this sum? The necessary repairs and expenses must, of course, be deducted, and, as they are found to be equal throughout the line, the proportion of the parish of Woking is to be ascertained by a mileage calculation, and is found by the case to be 384*l.* 2*s.* 10*d.*

Mr. Dalmahoy's groats are payable in respect of the use of the canal within his land in the parish of Stoke; and therefore, if they could be deducted at all, they must be deducted from the profits in that parish, and not from the profits in the parish of Woking. But these groats, as well as the per centages to Lord Montagu, and to the corporation of Guildford, are payable out of the profits of the canal, and are in truth nothing more than rent charges: they do not affect the value of the occupation, or the

(1) 31 R. B. at p. 185 (7 B. & C. 242).

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rent which a tenant would give, but only shew amongst whom and in what proportion the rent, or profits, are to be divided. The poor rates must be paid on the whole of the profits by those who receive them, viz. the proprietors, and they must settle the matter as they can with those who are entitled to share the profits with them.

[52]

The same reasoning applies to the compensations to the mills, for they also are payable out of the profits. One only of the mills is situate in the parish of Woking, the compensation paid to which is 65*l.* 6*s.*; but, for the reasons stated above, we think that not even this sum can be deducted.

Upon the whole, the gross receipts earned in the parish of Woking are found, according to the principles here laid down, to be 688*l.* 14*s.* 2½*d.* From that sum must be deducted 384*l.* 2*s.* 10*d.* for repairs and expenses, leaving a balance of 304*l.* 11*s.* 4½*d.*, from which 10 per cent. for tenants' profits, amounting to 30*l.* 9*s.* 1½*d.*, must be deducted, according to the rule laid down in *Rex v. The Trustees of the Duke of Bridgewater* (1). The case, indeed, does not state distinctly that lands are rated at rack-rent and no more, in the parish of Woking; but, as it finds that 10 per cent. is a reasonable deduction for tenants' profits, we presume that the fact is so; and this deduction must be made in order to equalize the rate; and the sum at which the proprietors of the navigation ought to be rated will then stand 274*l.* 2*s.* 2½*d.*

Rate to be reduced accordingly.

1835.

[53]

CHARLES FREDERICK, BARON DE RUTZEN, AND
MARY DOROTHEA, HIS WIFE, v. FARR.

(4 Adol. & Ellis, 53—57; S. C. 5 N. & M. 617; 1 H. & W. 735; 5 L. J. (N. S.) K. B. 38.)

Accounts of rent, signed by a person styling himself clerk to a steward, but not shewn to have been employed by such steward, otherwise than by the accounts themselves, are not evidence, after the decease of both, to prove the receipt, either by the clerk or the steward, of sums of money therein mentioned (2).

Where improper evidence is received, and a verdict given for the party

- (1) 32 R. R. 574 (9 B. & C. 68). judgment will be found to vary in
(2) The recital of facts in the some degree from the statement in

adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence (1).

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DEBT. The first count was for tolls and duties, due and payable to the Baron and Baroness de Rutzen, in respect of divers cattle, goods, and merchandizes brought for sale into a fair or market, belonging to the plaintiffs in right of the Baroness de Rutzen, holden at Narberth in Pembrokeshire. There was a second count for tolls and duties (not mentioning on what articles), due and payable to the plaintiffs as owners of the fair and market, in the same right. Plea, *Nil debet*. On the trial before Gurney, B. at the Haverfordwest Spring Assizes, 1834, the plaintiffs claimed the fair and market under a grant from James II. (dated Nov. 17th, 4 Jac. 2), to Sir John Barlow, knight and baronet, from whom they claimed to deduce title to an estate, called the Slebech estate, including the fair and market, by different assignments. Among other proofs, a lease of the tolls of the market by Ann Trevanion, through whom title was made, to John Bateman, for lives, at a specified rent, was produced; and a rental of the Slebech estate was also put in, in the handwriting of Gilbert James, a deceased steward of Ann Trevanion, in which he debited himself with the receipt of different payments of the rents reserved on this lease; and there was also *put in a rental, in the handwriting of John Protheroe, a deceased clerk of Gilbert James, in which also Gilbert James was debited with the receipt of certain payments of these rents. It was proved by a clerk, who was in James's service at the same time with Protheroe, that the latter had to make out James's accounts for him. Both these pieces of evidence were objected to; but the objections were over-ruled. A considerable body of other evidence was put in, shewing the

[*54]

the introductory part of the case. It has been thought advisable to frame the marginal abstract on the judgment, as representing the supposition upon which the learned Judges proceeded in deciding the case: but the principle of the decision

is little, if at all, affected by the variance.

(1) But see now R. S. C. Ord. XXXIX. r. 6, which seems to restore the principle adopted by the Common Pleas in *Doe v. Tyler*, 31 R. R. 496 (6 Bing. 561).—R. C.

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receipt of the tolls by the different parties through whom the plaintiffs claimed, or their lessees; and the plaintiffs had a verdict. In Easter Term, 1834, *Sir James Scarlett* obtained a rule to shew cause why this verdict should not be set aside, and a new trial had, by reason of the reception of the account in Protheroe's hand-writing. The rule was obtained on other grounds also; but on these no decision took place. In Easter Term last (Tuesday, April 28th),

Sir John Campbell, Attorney-General, *Cresswell*, and *John Evans* shewed cause (1):

The account objected to is in the writing of an authorized agent of the party charged by the writing; and this agent was proved to have been employed by the party as clerk, and to have kept his accounts for him; so that he had authority to charge him as steward. If the entry does not bind the steward, it must have been meant to bind the writer himself, and then it is unquestionably admissible. It may be compared to a pass-book at a banker's. It is true that the agent does not sign; but that is immaterial. Supposing, however, that the evidence was inadmissible, it may be rejected; and there will still be more than sufficient to support the verdict. That being so, the *Court will not send the case back to a new trial. This was decided by the Court of Common Pleas, in *Doe d. Lord Teynham v. Tyler* (2). It is true that the decision of the Court of Exchequer in *Crease v. Barrett* (3) is not quite consistent with that case.

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(LORD DENMAN, Ch. J.: In *Rex v. Sutton* (4) *LE BLANC*, J. says that, if some parts of the evidence received be inadmissible, and others admissible, the Court has not the means of referring the verdict to those parts only which were admissible; and that it is their habit in such a case to grant a new trial.)

That was said of criminal cases expressly.

(1) Before Lord Denman, Ch. J.,
Littledale, Patteson, and Coleridge,
JJ.

(3) 40 R. R. 779 (1 Cr. M. & R.
919; 5 Tyr. 458).

(4) 4 M. & S. at pp. 544, 548.

(2) 31 R. R. 496 (6 Bing. 561).

Sir W. W. Follett, contra :

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To make this account admissible, it must be such an account as shews a liability in the writer. The parol evidence was, that Protheroe, being James's clerk, kept his accounts. How can such an account make Protheroe liable? Even admitting that it may make James liable, it is not written by James, and is not therefore an entry charging the writer. As to the argument that this evidence is merely superfluous, and that the case was proved without it, the Court will not take upon themselves to decide as to the degree of weight which the jury might have attached to it. Besides, it was clearly evidence likely to produce considerable effect on the point as to which it was adduced.

(*Chilton and E. V. Williams* on the same side were not heard, the Court intimating that they would consider whether any further argument were necessary.)

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (November 25th) delivered the judgment of the Court :

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In order to prove the plaintiffs' title to a market, for disturbing which this action was brought, recourse was had to certain leases found among their muniments, and also to certain accounts of rent for the same market, found in the same place. Some of these were accounts signed by the person who was then steward to the plaintiffs' ancestor, wherein he charged himself with the amount of such rents. To these no objection was made. Other accounts, of the same nature, were produced, signed, not by such steward, but by a person styling himself clerk to such steward. There was no parol evidence to shew that this person was ever employed by the steward; but the papers were tendered as speaking for themselves. They were severally objected to when tendered, but the learned Judge admitted them in evidence. We are clearly of opinion that they were not admissible, because they do not purport to charge the person whose signature they bear.

We were, however, strongly urged to discharge this rule for a new trial, even though this evidence may have been improperly

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received, on account of the manifest preponderance of the proof arising from that which was unobjectionable. To induce us to adopt this course, *Doe d. Lord Teynham v. Tyler* (1) was strongly pressed upon us, founded as it was upon some former precedents both in this Court and in the Common Pleas. The same argument was urged in the Court of Exchequer, where evidence had been improperly rejected, in *Crease v. Barrett* (2); but the answer was given: It *may be that the evidence may be readily explained, and may not weigh in the least against the very strong evidence to which it was opposed; but we cannot, on that account, refuse to submit the question to the consideration of another jury. Mr. Baron PARKE, who pronounced the judgment of that Court, discusses the point at large; and a new trial was granted, because the Court could not say that if the evidence had been received it would have had no effect with the jury; nor that it was clear, beyond all doubt, if the verdict had been the other way, that it would have been set aside as improper.

In like manner, we are not convinced that the documents improperly admitted did not weigh with the jury in forming their opinion, or that their verdict, if given for the defendant, must have been set aside as against evidence. On this point, therefore, the rule must be made absolute; and we need not refer to the numerous other points that have been debated.

Rule absolute.

1835.
Nov. 2.

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TOWNLEY, ASSIGNEE OF WRIGHT, A BANKRUPT,
v. CRUMP AND ANOTHER (3).

(4 Adol. & Ellis, 58—64; S. C. 5 N. & M. 606; 1 H. & W. 564; 5 L. J. (N. S.) K. B. 14.)

A party having goods in his own warehouse at Liverpool sold them, and gave the following delivery order to the vendee: "We hold to your order 39 pipes," &c., "rent free to 29th November next." The goods remained in the same warehouse unpaid for till the purchaser became

(1) 31 R. R. 496 (6 Bing. 561).

(2) 40 R. R. 779 (1 Cr. M. & R. 519; 5 Tyr. 458).

(3) See Sale of Goods Act, 1893

(56 & 57 Vict. c. 71), s. 41 (2).—R. C.

bankrupt. In an action of trover for the goods by the assignee, evidence was given that, by the usage of Liverpool, goods sold while in warehouse are delivered by the vendor handing to the purchaser a delivery order; and that the holder of such an order may obtain credit with a purchaser as having possession of the goods.

Held that, as between the original vendor and purchaser, the right of lien was not divested by giving such a delivery order.

Also, that the bankrupt had not possession of the goods as reputed owner, with the consent of the true owner, within the meaning of the Bankruptcy Statutes.

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TROVER for wine, laying possession in the plaintiff as assignee. Pleas. 1. Not guilty. 2. That the plaintiff, as assignee, was not possessed, &c., concluding to the country. 3. As to the conversion of twenty-eight pipes and one hogshead, that, before the bankruptcy, and before the times when &c., viz. on &c., the defendants bargained and sold to Wright, the bankrupt, and he bought of them, the said twenty-eight pipes and one hogshead of wine, at the rate of &c., to be paid for by Wright's accepting a bill of exchange in that behalf; that he accepted the same for the amount of the wines, payable at three months; that the bill was presented when due, but not paid; that the defendants, at the time of the bankruptcy, and at the times when &c., were and still are the holders of the said bill; that a large sum, viz. &c., the price of the said pipes and hogshead, was, at the time of the bankruptcy, and at the times when &c., and still is, unpaid to the defendants; and that the said pipes and hogshead were not delivered by the defendants to Wright at any time before or at or after the said sale; but the same, and each and every part thereof, at the time of the sale, were in the custody and possession of the defendants; and that they so continued and remained, from the time of the said sale continually, until and at and after the bankruptcy, and from thence continually until and at the said times when &c.; of all which (notice to *plaintiff); whereupon and whereby the defendants acquired and had a lien upon the said pipes and hogshead for the said price thereof, and became and were entitled to retain the same until the said price should be fully paid and satisfied; wherefore, and because the said price, &c., at the said times when &c., was wholly due and unpaid, unsatisfied, and untendered to the defendants, they, when requested as in the declaration

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mentioned, refused to deliver the said pipes and hogshead to the plaintiff, and did, after the bankruptcy, at the said times when &c., retain and keep the same under and by virtue of the said lien, and as they lawfully might, &c., which keeping, &c., was the conversion in the introductory part of this plea mentioned. Verification.

Replication. 1 and 2. *Similiter*. 3. *De injuriâ*.

At the trial before Lord Abinger, C. B., at the last Summer Assizes at Liverpool, it appeared that the defendants, at the time of the transactions in question, were wine merchants at Liverpool; and that they sold the wine mentioned in the third plea to the bankrupt Wright on the 29th of September, 1834, it being then held by the defendants in bonded warehouses which they had at Liverpool. An invoice was delivered at the time, stating the wine (described by marks and numbers) to be bought by Wright of Crump & Co., the price payable by acceptance at three months; which acceptance Wright gave. On the same 29th of September the defendants gave Wright the following delivery order:

“LIVERPOOL, 29th September, 1834.

“Mr. BENJAMIN WRIGHT,

“We hold to your order 39 pipes and 1 hhd. red wine, marked J. C. J. M. No. 41 a 67—69 a 80—pipes, No. 105 hhd., rent free, to 29 November next.

“JOHN CRUMP & Co.”

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The bill accepted by Wright was dishonoured, and the amount never paid. A fiat in bankruptcy issued against Wright, January 28th, 1835, and he was thereupon declared a bankrupt, and the plaintiff appointed assignee. A demand and refusal of the wine were admitted; as, also, “that the invariable mode of delivering goods sold while in warehouses in Liverpool is by the vendors handing to the vendees delivery orders.”

For the plaintiff it was proposed to give evidence, that the order in question was equivalent to an accepted delivery order; but the LORD CHIEF BARON held such evidence inadmissible. The plaintiff's counsel then called Mr. Preston, a broker and merchant, who held bonded vaults in Liverpool; and he stated that the practice was to deliver goods while in warehouses by

handing delivery orders, which were not usually given until payment, or something equivalent, had been received for the goods; that such orders varied in their form; that delivery orders were given resembling that in question; and that in his opinion the present order would obtain credit for the holder with a purchaser. He was proceeding to state that he should consider the possession of such an order possession of the property; but the LORD CHIEF BARON refused to admit this evidence. The witness, however, said that, as a matter of custom, the goods specified in such a delivery order would be considered the property of the person holding the order. It was not stated that the defendants had made any transfer in their books. The LORD CHIEF BARON was of opinion that no sufficient delivery was shewn to divest the lien of the defendants: he observed that the giving of an invoice, or bill of lading, does not take away the right to stop *in transitu*, if there has been no *actual delivery of the goods; and he directed a nonsuit, giving leave to move to enter a verdict for the plaintiff for the value of the twenty-eight pipes and one hoghead.

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Cowling now moved (1) that such verdict might be entered, or a new trial had:

The facts admitted and proved shewed a constructive delivery to Wright before he became bankrupt. It is clear that, if the wine, instead of being the property of the warehousemen in whose vaults it was, had belonged to a third person, who had sold it to the bankrupt, and had given him such delivery order upon the warehousemen, the handing of such order to them by the buyer would have been a constructive taking possession by him, and the order could not have been countermanded: *Abbott on Shipping*, part 3, c. 9, s. 15 b (2). So it would have been also in the present case, if Wright had sold to another person, and the defendants had given a delivery order to such person. *Storeld v. Hughes* (3) and *Green v. Haythorne* (4) shew this; but the present case is a stronger one in favour of the vendee's right.

(1) Before Lord Denman, Ch. J.,
Patteson, Williams, and Coleridge, JJ.
(2) P. 379, 5th ed.

(3) 12 R. R. 523 (14 East, 308).
(4) 18 R. R. 805 (1 Stark. 447).

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In a note to the fourth American edition of Abbott on Shipping (by the Hon. Joseph Story, one of the Judges of the Supreme Court of the United States,) it is said (1): "and where goods are sold, lying in the vendor's warehouse, on credit, and they are sold by marks and numbers, so that no farther designation is necessary, and it is a part consideration of the bargain that they may remain there, rent free, at the option of the vendee, and for his benefit, *until the vendor shall want the room, there is in point of law a complete delivery of the goods, and the transit is ended, as much as if the goods were in the warehouse of a stranger." And *Barrett v. Goddard* is cited from Mason's (American) Reports (2).

(LORD DENMAN, Ch. J.: I do not know that we can allow these works to be cited as authorities, though Mr. Justice STORY is a very able commentator, and it would be desirable to find that the American authorities agreed with the opinion we may form.

PATTESON, J.: You maintain here that the possession is changed by a delivery order which the vendor makes upon himself. No custom going to such an extent as that was recognised in *Dixon v. Yates* (3).)

The question did not arise in that case; the delivery orders there mentioned were drawn by the vendor on the warehouseman: here the vendor and warehouseman are the same person, and therefore the delivery orders are in the nature of accepted delivery orders. It is plain from Abbott, as before cited, that if the vendor had given the bankrupt a delivery order addressed to and accepted by the vendor's agent, the warehouseman, the possession would have been changed; and there seems no reason for a distinction, where the vendor acts as his own warehouseman and agent. *Storeld v. Hughes* (4) and *Green v. Haythorne* (5) do not authorise such a distinction. The ground of decision in those cases is, that the facts shew an executed delivery. And, further, it would be a fraud upon the public if a purchaser *might

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(1) P. 381, n. (1), to part 3, c. 9, s. 15 b; Boston, 1829.

(2) 3 Mason's Reports of Cases argued and determined in the Circuit Court of the United States, p. 107;

Boston, 1828. The judgment cited was delivered by STORY, J.

(3) 39 R. R. 489 (5 B. & Ad. 313).

(4) 12 R. R. 523 (14 East, 308).

(5) 18 R. R. 805 (1 Stark. 447).

go into the market with the symbol of property, which these orders clearly are, and yet should be liable to have the contract of sale to him rescinded. The holder of such an order has what amounts to a reputed ownership of the goods. A delivery order is not like a bill of lading, which merely serves to shew who is the owner : holding a delivery order is having actual possession. Its effect is like that of a dock warrant, as stated in *Spear v. Travers* (1) and *Lucas v. Dorrien* (2). The words "rent free" in the delivery order shew that the defendants, on giving it, considered themselves as becoming merely warehousemen for the bankrupt. At all events it should have been left to the jury, whether or not the facts amounted to a taking of possession. The delivery order was entirely a mercantile instrument, the effect of which they were competent to judge of.

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v.
CRUMP.

Cur. adr. vult.

LORD DENMAN, Ch. J., on a subsequent day of the Term (November 19th) delivered the judgment of the COURT :

After referring to the facts above stated, as to the custom with respect to delivery orders, his Lordship said : There was a total failure of proof that, where a vendor who is himself the warehouseman sells to a party who becomes bankrupt before the goods are removed from the warehouse, the delivery order operates, by reason of this custom, to prevent a lien from attaching ; and I think it is not contended that there is any general usage which could divest this right in such a case, upon the insolvency of the vendee. Cases have been cited, but none where the question arose between the original *vendor and vendee. As to reputed ownership, it is quite clear that the seventy-second section of stat. 6 Geo. IV. c. 16 (3), would not apply, for it refers to cases where the bankrupt shall "by the consent and permission of the true owner" have goods in his possession. Here the bankrupt, if he had possession, was himself the true owner, under the contract of sale. There will therefore be no rule.

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Rule refused.

(1) 4 Camp. pp. 253, 4.

(3) See the Bankruptcy Act, 1883

(2) 18 R. R. 480 (7 Taunt. 278 : (46 & 47 Vict. c. 52), s. 44 (iii).—
judgments of the Court). R. C.

1835.
Nov. 3.
[71]

HOOPER v. STEPHENS AND WIFE.

(4 Adol. & Ellis, 71—72; S. C. 5 N. & M. 635; 1 H. & W. 480; 5 L. J. (N. S.) K. B. 4; S. C. at Nisi Prius, 7 Car. & P. 260.)

Where it has been agreed between debtor and creditor that the latter shall receive goods in reduction of his demand, the delivery of the goods operates as a payment within stat. 9 Geo. IV. c. 14, s. 1, to bar the Statute of Limitations.

ASSUMPSIT for the price of hay sold to the wife before marriage. Pleas, *non assumpsit*, and the Statute of Limitations. On the trial before Lord Denman, Ch. J., at the Gloucester Summer Assizes, 1835, the plaintiff, to take the case out of the statute, proved that, after the delivery of the hay, and within six years of the commencement of this action, the wife (who was then single, and kept a public-house) said to the plaintiff, "Mr. Hooper, you must make use of some spirit, I know; why not have it of me? As long as I owe you money for hay, if it is ever so little it will be a way to lessen the debt." The plaintiff said he would take a gallon of gin at 12s., and a jar filled with gin was sent to him. It was contended that this delivery of goods by the wife was equivalent to a part payment, and barred the statute; and *Hart v. Nash* (1) (in the Court of Exchequer) was referred to. On the other hand, it was urged that the delivery could not operate as a payment, inasmuch as the defendants, if now suing for the price of the spirits, could only declare as for goods, and not for a liquidated sum of money. The LORD CHIEF JUSTICE gave leave to the defendants to move to enter a nonsuit; and the plaintiff had a verdict.

Ludlow, Serjt. now moved according to the leave reserved :

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The plaintiff must rely upon the clause in *Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 1, which provides that nothing therein contained "shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever." To bring this case within the proviso, there ought to have been what is technically and properly called a payment; such as might formerly have been given in evidence under the general issue. This transaction was not such a payment.

(1) 41 K. B. 732 (2 Cr. M. & R. 337).

(LORD DENMAN, Ch. J.: *Hart v. Nash* (1) appears to be in point.)

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v.
STEPHENS.

The COURT (2) took time to enquire as to the decision in *Hart v. Nash* (1), which was not yet reported; and, in the same Term (November 7th),

LORD DENMAN, Ch. J. said :

Hart v. Nash (1), decided in the Court of Exchequer, rules the present case. Where any thing is received, upon agreement, in reduction of a debt, that is a payment sufficient to take the debt out of the Statute of Limitations.

Rule refused.

GAMBRELL v. THE EARL OF FALMOUTH AND AUSTIN.

1835.
Nov. 3.

(4 Adol. & Ellis, 73—76; S. C. 5 N. & M. 359.)

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To a declaration for an excessive distress for rent, defendant pleaded that the whole sum distrained for was due and in arrear, concluding to the country, on which plaintiff joined issue: Held, that, on this issue, defendant was not precluded from insisting on certain arrears, by the fact that, since they became due, other arrears had become due and had been distrained for. And this, although, on the first distress, the warrant and notice stated the distress to be for rent due up to a day named, being subsequent to those on which the arrears now in question accrued; and although, on the second distress, the defendant stated that it was for rent due since the last distress.

CASE for taking an excessive distress for 5*l.* 10*s.*, whereas only 1*l.* 8*s.* was due. Plea, that the whole was due and in arrear (not stating for what time), concluding to the country. *Similiter*. On the trial before Lord Denman, Ch. J., at the last Berkshire Assizes, it appeared that the plaintiff held the premises, on which the distress was made, as weekly tenant, of the defendant, the Earl of Falmouth, originally at a rent of 2*s.* 6*d.* per week; and that, on the 30th of June, 1834, Lord Falmouth gave the plaintiff notice to quit, or to pay double rent; that Lord

(1) 41 B. R. 732 (2 Cr. M. & R. 337).

(2) Lord Denman, Ch. J., Patterson, Williams, and Coleridge, JJ.

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THE EARL OF
FALMOUTH.

Falmouth afterwards gave a second notice to the defendant to quit on the 8th of December, 1834, or to pay double rent, namely 10s. per week; that, on the 6th of February, 1835, he levied a distress for 4l., being eight weeks' rent at 10s., due from the 8th of December to the 2nd of February, and being stated, in the warrant and notice, to be for rent due up to the latter day. The plaintiff brought an action for this distress, as excessive, and recovered judgment. On the 27th of April, 1835, the defendant Austin levied the distress for which the present action was brought, on a warrant for 5l. 10s., being rent in arrear on the 22nd of April, and it was shewn that he stated this to be for rent due since the last distress. The plaintiff's counsel contended that the distress was not authorized by stat. 4 Geo. II. c. 28, s. 1. In answer, the defendants offered proof that there were *arrears of rent unsatisfied, which had accrued on days antecedent to the accruing of those arrears which were distrained for on the 6th of February, 1835; and that such previous arrears made up the 5l. 10s. at the rate of the original rent. The plaintiff's counsel contended that these could not be taken into account; but the LORD CHIEF JUSTICE received the evidence, and the defendant had a verdict.

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Ludlow, Serjt. now moved for a new trial :

Although it is competent to a landlord to distrain on one account, and avow on another, yet that principle is inapplicable to a case where the complaint is that too much has been distrained for. The distress on the 6th of February, 1835, must be considered as having the effect of a statement of account by Lord Falmouth, up to that day. "It is the duty of a landlord to make a distress, at once, for his whole rent, if he can find sufficient goods on the premises; for various distresses are vexatious to the tenant. And, therefore, at the common law, if the landlord made an insufficient distress when he might have taken more, a second distress for the remainder of the same rent was illegal: for it was his own folly not to have taken enough at first; but if it appeared that he could not find a sufficient distress on the land, then it seems, that even at the common law, he might distrain again": *Bradby on Distresses*,

ch. 5, p. 130 (1). The statute 17 Car. II. c. 7, s. 4, enables the landlord, in the cases there pointed out, to make successive distresses, if the distress shall not be found to be of the full value of the arrears distrained for; but it *is not pretended here that such was the case on the first occasion, or that there was not then a sufficient distress on the premises for all the arrears claimed at the time.

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FALMOUTH.

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PATTESON, J. :

No doubt a man is not entitled to distrain at different times for a rent due on the same day. But if rent become due at different times, he may distrain separately. Independently of that, look at this issue. The question is, whether the sum was in arrear or not. If it is not satisfied, it is still in arrear.

WILLIAMS, J. :

I understand the objection to be that, because the defendants assumed to distrain for rent not proved to be due, they were precluded from justifying themselves by shewing that there was other rent in arrear. I do not see why they are to be prevented from shewing that rent was in arrear, different from that for which they at first claimed.

COLERIDGE, J. :

The objection, if there be one, is to the reception of the evidence. But what is the issue? Whether so much is due and in arrear. I cannot conceive why arrears are not to be taken into consideration, because there has been a distress, since they accrued, under which they were not satisfied. It may be very true, that the landlord thought he had covered all the arrears by the first distress. But that is not to prevent him, under this issue, from shewing what was really due.

LORD DENMAN, Ch. J. :

The issue is, how much was due? The objection now raised is, that the defendants cannot say that more was due at the

(1) Citing *Wallis v. Savill*, 2 Lutw. 1536; *Anon.*, Cro. Eliz. 13.

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PALMOUTH.
[*76]

former period, *than they then claimed. That objection does not apply, as the pleadings stand. There seems to me to be no ground of complaint, either in law or in justice.

Rule refused.

1835.
Nov. 4.

DOE D. PREEDY *v.* HOLTOM AND ANOTHER.

(4 Adol. & Ellis, 76—82; S. C. 5 N. & M. 391; 5 L. J. (N. S.) K. B. 10.)

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Devise to A. of the messuage in S. in which testator resided, with the buildings to the same adjoining, and all those several closes in S. aforesaid, called C., D., and E., (with the brick-kiln erected thereon,) and F., with their appurtenances, part of the farm and lands then in testator's own occupation. Devise, further, to B. of a second messuage, and of all other the testator's lands and hereditaments in S. except those before devised to A. Under this will, B. claimed two cottages in S. which, when the will was made, adjoined the messuage resided in by the testator, but were not in his occupation, and were divided by a wall, which he had built, from the messuage.

Held, that the words referring to the testator's own occupation applied only to the premises mentioned after the words "to the same adjoining;" that evidence was admissible to shew the situation of the premises, and by whom they were occupied; but that those facts, being proved, did not raise such an ambiguity as warranted the reception in evidence of declarations made by the testator when giving instructions for his will, to shew that he intended B. to have the cottages.

THIS ejectment was tried before Williams, J. at the Oxfordshire Summer Assizes, 1836. The premises claimed were two cottages, with gardens, outhouses, &c., at Swalcliffe, Oxfordshire. The defendants made title under Joseph Preedy, the elder brother of the lessor of the plaintiff. Both brothers claimed the premises in question under the will of their father.

The testator, by his will, produced at the trial, devised to trustees all his real estate, upon trust that his said trustees and the survivor of them and the heirs of such survivor should, during the minority of his eldest son Joseph Preedy, receive the rents and profits of all that messuage or tenement in Swalcliffe aforesaid wherein he the said testator then resided, with the offices, outhouses, barns, stables and other edifices and buildings, yards and gardens, to the same adjoining, and all those several closes or enclosed grounds, pieces and parcels of land lying and being in Swalcliffe aforesaid, called or *known by the several

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names of Cow House, Trenchill, Lower Trenchill, Fernhill, Close taken out of Trenchill, together with the brick-kiln erected thereon, and the Farhill, with their appurtenances, part of the farm and lands then in his own occupation, as the same should become due, and did and should stand and be possessed of such rents, issues, and profits, upon the trusts and for the intents and purposes therein-after expressed and declared concerning the same; and, when and so soon as his said son Joseph Preedy should have attained the age of twenty-one years, then did and should be seized of and in all that his said messuage or tenement in Swalcliffe aforesaid wherein he then resided, with the offices, out-houses, barns, stables, and other edifices and buildings, yard and garden to the same adjoining, and the said several closes or inclosed grounds, pieces and parcels of land in Swalcliffe aforesaid last therein-before particularly mentioned, with their appurtenances, in trust for his said son Joseph Preedy, his heirs and assigns for ever.

And upon further trust that they the said trustees and the survivor of them, and the heirs of such survivor, did and should, during the minority of his, the said testator's, son Benjamin Preedy, receive the rents, issues, and profits of all that his messuage or tenement in Swalcliffe aforesaid called the Old Grange, with the offices, out-houses, and other edifices and buildings, yard and garden, to the same adjoining, and all and every other his closes or inclosed grounds, pieces and parcels of land, and other hereditaments, in Swalcliffe aforesaid, with their appurtenances, except what he had therein-before devised to or in trust for the use of his eldest son Joseph Preedy, as the same should become due: and did and should stand *and be possessed of such rents, issues, and profits, upon the trusts, and for the intents and purposes therein-after expressed and declared concerning the same; and when and so soon as his said son Benjamin should attain his age of twenty-one years, then upon trust that they his said trustees or the survivor of them, or the heirs of such survivor, did and should stand and be seized of and in all that his said messuage or tenement in Swalcliffe aforesaid, called the Old Grange, with the offices, out-houses, and other edifices and buildings, yard and garden to the same adjoining,

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and all and every his said closes or inclosed grounds, pieces and parcels of land and other hereditaments in Swalcliffe aforesaid, last therein-before mentioned, with their appurtenances, in trust for his said son Benjamin Preedy, his heirs and assigns for ever.

The question at the trial was, whether the cottages with the gardens &c. passed to the trustees for Joseph under the first part of the will, or for Benjamin under the subsequent devise of all the closes and hereditaments not before devised. For the plaintiff, evidence was given that the testator lived in the messuage at Swalcliffe at the time when he made his will; that the cottages had formed part of the Swalcliffe farm, but that the testator had separated them from it by a wall, and that, before and at the time when the will was made, they were so separated, and were in the occupation of tenants. It was further proved, for the plaintiff, that there were cottages on the Swalcliffe estate, a quarter of a mile from the place where the testator resided. Evidence was also given as to the comparative value of the Swalcliffe and Grange properties. And, for the purpose of shewing that the testator intended the two *cottages in question to pass under the second, and not the first clause of his will, the plaintiff's counsel proposed to prove certain declarations made by the testator, when giving instructions for his will: but this evidence was objected to, and excluded. The learned Judge in summing up told the jury that the question was one of law, and that in his opinion the cottages adjoining the Swalcliffe farm passed to Joseph by the will; but that the plaintiff should have leave to move to enter a verdict for him if the Court of King's Bench should hold, upon the facts proved, that the words of the devise were not sufficient to pass the premises in question to the trustees for Joseph's use. The defendants had a verdict, and leave was given to move.

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Ludlow, Serjt. now moved that a verdict might be entered for the plaintiff, or a new trial had on account of the rejection of evidence:

The cottages passed to the trustees for Benjamin, the lessor of the plaintiff, by the residuary clause. It is true they may be said to adjoin the tenement on which the testator dwelt,

according to the first clause, but that requires, not only that the buildings, &c., which are to pass for the benefit of Joseph shall adjoin the testator's residence, but also that they shall have been "part of the farm and lands in his occupation" at the time when he made his will. If there is a doubt as to the meaning, Benjamin, who, as the residuary legatee, stands in the situation of an heir-at-law, is entitled to a construction in his favour: nothing is to be taken from him unless expressly devised. As to the evidence; extrinsic evidence was admitted in explanation of the will, and from that a difficulty resulted, which required *further parol evidence to explain it; for it appeared that the premises "adjoining" those inhabited by the testator were not "in his own occupation." This is one of the cases in which TINDAL, Ch. J., lays it down, in *Miller v. Trarers* (1), that "the difficulty or ambiguity which is introduced by the admission of extrinsic evidence, may be rebutted and removed by the production of further evidence, upon the same subject, calculated to explain what was the estate or subject-matter really intended to be devised."

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[*80]

(WILLIAMS, J.: The extrinsic evidence adduced was only for the purpose of shewing the situation and divisions of the property, and the manner in which it was occupied; there was nothing beyond that, to introduce evidence of declarations.

PATTERSON, J.: The declarations were offered to shew what was meant by the will; the other evidence only shewed what was within the terms of the will.

LORD DENMAN, Ch. J.: Evidence might be given to shew what were the parcels. That evidence, in the present case, did not introduce any ambiguity. It was as if the testator had said "I devise my cottages," and you had offered evidence of declarations by him that he meant his house in London.)

The evidence which it was here proposed to offer was, that the testator directed his will to be so framed as to pass the cottages to the use of Benjamin.

(1) 34 R. R. at p. 706 (8 Bing. 247).

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LORD DENMAN, Ch. J. :

[*81] The testator devises to the trustees for Benjamin all his closes, pieces of land, and other hereditaments in Swalcliffe, except what he has before devised to or in trust for the use of his eldest son. What has he so devised? The rents and profits *of the messuage in Swalcliffe wherein he resided, with the offices "and other edifices and buildings, yards and gardens, to the same adjoining." Among these are the cottages in question. But he then gives some lands as "part of the farm and lands then in his own occupation;" and it is contended that this makes his own occupation a necessary part of the description of all that he gives to the eldest son. I think that is not so, but that part of what is given is adjoining to the residence of the testator, and part in his occupation. Then property is here shewn to exist, which precisely answers the terms of the will. Upon this point there is no doubt. The learned Judge, therefore, would not have been justified in receiving evidence of declarations for the purpose of shewing the testator's intention. The ambiguity was not raised which might have rendered such declarations admissible (1). If the testator gave instructions which have not been followed, that cannot now be helped.

PATTESON, J. :

We are desired to read the will as if the words were "edifices and buildings to the same adjoining, and now in my own occupation." That, I think, cannot be done. Extrinsic evidence must be received, for the purpose of shewing what a will refers to; but not to clear up a difficulty in the terms of the will. If the evidence here tendered had been admitted, it would have been for the purpose of shewing, that the language of the devise in question meant "adjoining, and now in my occupation." That would have been receiving evidence to construe the will.

[82] WILLIAMS, J., concurred.

COLERIDGE, J. :

The only expression restricting the words "other edifices and buildings, yards, and gardens," is "to the same adjoining."

(1) See *Richardson v. Watson*, 38 R. R. 366 (4 B. & Ad. 787).

The words "part of the farm and lands now in my occupation," refer to other premises. No ambiguity was raised here. Some extrinsic evidence is necessary for the explanation of every will. If the word "Blackacre" be used, there must be evidence to shew that the field in question is Blackacre. But here the declarations were offered in reality for the purpose of construing the expressions of the will, and giving them a more extended meaning than the words themselves bear.

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Rule refused.

ROE D. EDMUND WILKINS AND JOHN WILKINS
v. JAMES WILKINS.

1835.
Nov. 6.

(4 Adol. & Ellis, 86—89; S. C. 5 N. & M. 434; 1 H. & W. 574.)

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In ejectment, the defendant, upon notice from the plaintiff, produced a deed; and it was proved that the defendant's attorney had stated, before the trial, that the defendant claimed through that deed: Held, that this entitled the plaintiff to put it in, without proving the execution, before the defendant's case was opened.

EJECTMENT for premises in Gloucestershire. On the trial before Lord Denman, Ch. J., at the last Gloucester Assizes, it appeared that Edmund Wilkins claimed as administrator to Joseph Wilkins the elder, deceased; and that John Wilkins claimed as administrator to Ann Wilkins, deceased, the wife of Joseph Wilkins the elder. The title of Joseph Wilkins the elder rested upon a lease of the premises in question, made to Ann Wilkins, which the plaintiff had given the defendant notice to produce, and which was called for at the trial, and produced by the defendant. No evidence was given of the execution; but it was proved, on the part of the plaintiff, that the defendant's attorney had said, shortly before the trial, that the defendant claimed under the *lease. The LORD CHIEF JUSTICE was of opinion that this dispensed with proof of the execution; but he gave leave to move to enter a nonsuit. * * Verdict for the plaintiff.

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Ludlow, Serjt. now moved to enter a nonsuit, or for a new trial on the ground of misdirection:

First, it is true that, when a party produces a deed which has been called for, under which he himself claims, the other side

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may treat the execution of the deed as proved. But that principle is applicable only where it appears that the party producing rests his case, at the trial, on the validity of the deed. Here, the party producing, being the defendant in ejectment, was not called upon to shew any title till the plaintiff had proved a title. The plaintiff cannot assume, upon evidence of any thing passing out of Court, what the defendant's case is to be, for the purpose of relieving himself from the burthen of proof. * * *

LORD DENMAN, Ch. J. :

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It is clear that the lease was properly received in evidence without proof of its *execution. *Knight v. Martin* (1) shews this. It did indeed appear, in that case, that both parties claimed under the same agreement : but extrinsic evidence was admitted to shew that fact ; and the rule necessarily supposes that such a fact must be shewn by extrinsic evidence ; for it could not appear from the inspection of the deed till the deed could be read. * * *

PATTESON, J. :

I am of the same opinion. DALLAS, Ch. J., in *Knight v. Martin* (1), draws a distinction between cases where parties claim the same interest, and those where they claim adversely ; but here the contending parties had clearly one common interest in the title created by the deed.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule refused.

1835.
Nov. 10.
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HOLMES v. MENTZE (2).

(4 Adol. & Ellis, 127—134 ; S. C. 5 N. & M. 563 ; 1 H. & W. 608 ; 4 Dowl. P. C. 300 ; 5 L. J. (N. S.) K. B. 62.)

Under s. 6 of the Interpleader Act, 1 & 2 Will. IV. c. 58, the Court will not make a rule for the protection of a sheriff who has levied under a *fi. fa.*, merely because a partner of the debtor has given notice to the sheriff to quit possession on the ground that the goods are partnership

- (1) 21 R. B. 787 (Gow, N. P. 26). in *In re Tamplin, Ex parte Barnett*
(2) Cited in judgment of SMITH, J. (1890) 59 L. J. Q. B. 194, 196.—R. C.

property and that the debtor has no beneficial interest in them, being indebted to the firm beyond the amount of his share in the effects.

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The sheriff's duty is to sell the share, though he may not be able to ascertain the amount of actual interest.

But the Court will, in the above case, interfere under the Act for the sheriff's protection, if the creditor disputes the partnership.

And where the creditor, having appeared under the interpleader rule and not contested the partnership, whereupon the rule was dismissed, afterwards refused to admit it, and ruled the sheriff to return the writ, the Court enlarged the latter rule till the creditor should indemnify the sheriff.

A RULE was obtained in Easter Term last, under the Interpleader Act, 1 & 2 Will. IV. c. 58 (1), on behalf of the sheriff of Lancashire, calling on the plaintiff and John Heap to appear and state their respective claims to certain wine and spirits, seized by the sheriff under a *fi. fa.* in this cause, or else relinquish the same, &c. The goods were taken in execution, February 17th, 1835, upon a judgment entered up against the defendant on a warrant of attorney given by him to the plaintiff, and bearing date November 17th, 1834. The defendant was a wine merchant. His name, and no other, appeared over the premises (vaults and cellars in Manchester) on which the seizure was made. The officer who seized was served, the day after, with a notice addressed to the plaintiff, his attornies, &c., the sheriff, and the officer, signed by John Heap, and stating that all the goods taken in execution were the property of a partnership between Heap and the defendant, carried on under the firm of Mentze & Co.; that the defendant had not any property, part or share in the said goods, but was considerably indebted to Heap on the balance of the partnership accounts; and that Heap was alone beneficially entitled to and interested in all the goods, property and effects of the said partnership. He therefore required the parties addressed by the notice to quit possession; and stated *that, if this were not done, he should commence against them respectively such actions, suits, and other proceedings as might be advised.

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In answer to the present rule, Heap filed an affidavit, repeating the statements in the notice, and adding more particular ones; and alleging, further, that the defendant, in 1831, became

(1) *Rep.* 46 & 47 Vict. c. 49, s. 3. See now R. S. C. Ord. LVII.—R. C.

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his partner in the wine and spirit business, carried on in Manchester : that, on a balance of account taken in June, 1834, the defendant was found to owe the partnership 2,557*l.*, which debt had not been reduced but increased : and that the damages recovered in this suit were due from the defendant on his own account solely, the plaintiff being unknown to Heap, and having no demand against the partnership.

Sir J. Campbell, Attorney-General, and *M. Chambers*, for the plaintiff :

This is not a case within stat. 1 & 2 Will. IV. c. 58, s. 6. No issue could be directed under the statute. The sheriff is not "exposed to the hazard" of an action. Heap, by his own statement, admits that the defendant is interested in the goods as his partner. The seizure, therefore, could not be a trespass. The sheriff had a right to take the goods, and to sell the defendant's interest in them. As to the quantity of interest, the Court will not hear equitable claims discussed on an application under this Act : *Sturges v. Claude* (1).

Sir W. W. Follett and *Knowles*, for the sheriff :

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It is true that the right to seize is not disputed ; but the *question is, whether the sheriff can sell, Heap claiming the entire property in the goods. The sheriff is threatened with an action by the notice, and is, therefore, entitled to protection under the statute. If he is to sell, must he sell the goods as the defendant's property, or as that of the partnership ? In the one case, Heap threatens to proceed against him ; in the other, the execution creditor will hold him liable for not having sold at the best price that might have been obtained.

(COLERIDGE, J. : Have you had any communication on the subject with the execution creditor ? Must not there be an actual dispute to entitle the sheriff to assistance ? (2))

The creditor appears under this rule, and requires the sheriff to sell the goods as the defendant's.

(1) 1 Dowl. P. C. 505.

(2) See *Isaac v. Spilsbury*, 10 Bing. 3.

(PATTERSON, J. : For the amount of his interest in them.)

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MENTZE.

It is disputed whether he has any interest in them, as partner, at all. The plaintiff causes a warrant to issue, commanding the sheriff's officer to levy on goods stated to be the defendant's. Then notice is given to the officer by Heap, that the defendant has no property in the goods, but that Heap alone is beneficially interested in all the partnership effects. To put the goods up for sale, giving special notice of the circumstances, would not be a proper course. If it were so, it might be adopted in every case where the assistance of this Court is now sought for. The sheriff (but for the statute) is bound to decide, at his peril, whether the goods are liable to be sold, or are the property of the adverse claimant, and must act upon his discretion. In a case under this Act, before Taunton, J., and in which he consulted the rest of the *Judges (1), the third party claimed in respect, not of the entire property, but of a lien. There it might have been said that the property could be offered for sale, with notice of the alleged claim to which it was subject; but the case was held to be within the protection of sect. 6. The material inquiry, in this case, will be, whether the defendant is entitled to the whole property, or only to an interest, with other persons.

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(COLERIDGE, J. : *Quâcunque riâ*, the sheriff may sell.)

The question is, whether he shall sell the property as the defendant's, or as that of the defendant and others. If the Court directed an issue, it would be, whether the goods were partnership property or not: and, if they were, what was the defendant's interest. The power which, it is said, the sheriff may exercise, of selling subject to an alleged partnership interest, is not clear. In *Burton v. Green* (2), where a *fi. fa.* had issued against one of three partners, and it was contended that the sheriff ought to have levied on the partnership property to the extent of one third, Lord TENTERDEN said, "I am not quite satisfied as to the interest which the sheriff might have sold under the execution. There is great difficulty in making the sheriff a tenant in common with the partners."

(1) Probably *Ford v. Baynton*, 1 Dowl. P. C. 357.

(2) 3 Car. & P. 306.

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Sir F. Pollock and Tomlinson, on behalf of *Heap*, referred to *Harvey v. Crickett* (1), in answer to the above *dictum*; and they requested that the Court would not discharge the rule without putting the case in a course of investigation.

[131] LORD DENMAN, Ch. J. :

The sheriff, in this case, is called upon to seize goods of the defendant, at the plaintiff's suit, but a third party, alleging that the defendant is his partner, requires the sheriff not to act, because the defendant is indebted to the partnership in more than the amount of his share. That does not interfere with the sheriff's duty. He is to sell for such interest as the defendant has as partner; not for the degree of right which he may be found to have, on a winding up of the affairs, because, if the sheriff waited till that could be ascertained, the goods might remain unsold for an indefinite time. Under the law as it formerly stood, and it is the same now, the sheriff, in a case of partnership, must, however inconvenient it may be, sell the share of the defendant partner, and make the purchaser tenant in common with the other partners; and the purchaser must do the best he can to ascertain what interest there is. My brother COLERIDGE says that, in the Court of Common Pleas, it is usual, on a rule of this kind, to require that some actual communication should have been made by an adverse claimant. As to *Heap*, I do not think an adverse claim is asserted by his merely saying "I am a partner of the defendant." If, however, the execution creditor should insist upon the goods being sold as the property not of a partnership but of the debtor alone, the sheriff ought to have an indemnity.

PATTESON, J. :

[*132] If it be conceded that the goods are partnership property, there is no difficulty in the case. Otherwise, the sheriff is between two fires; he must sell the goods as partnership property or not, and either way he may be liable. If the execution creditor insists on his selling the property as that

of the defendant alone, the sheriff ought to have time to return the writ, unless indemnified.

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WILLIAMS and COLERIDGE, JJ. concurred.

The rule was discharged, it being understood that the sheriff should make a further application to the Court if it became necessary.

On the day after this decision (November 11th) the sheriff's agent wrote to the plaintiff's attorney, requesting to know whether the plaintiff admitted or denied the partnership between Heap and the defendant, stating that in the latter case he should require an indemnity, and desiring to know if it would be given. The plaintiff's attorney wrote in answer: "Acting under the advice of counsel, I am not prepared to make the admissions you desire." The sheriff's agent again inquired if an indemnity would be given, but obtained no reply. On the 11th of November the plaintiff's attorney took out a rule calling on the sheriff to return the writ. On a subsequent day of the Term, a rule was obtained, enlarging the time for the sheriff to return the writ, and calling on the plaintiff to shew cause why the rule of November 11th should not be enlarged until the plaintiff should indemnify the sheriff to the satisfaction of the Master. On the 25th of November,

Sir J. Campbell, Attorney-General, and *M. Chambers*, shewed cause:

There is no authority for the interference *claimed. The risk against which the sheriff seeks indemnity is the ordinary one, which the law casts upon him, and for which his poundage is the consideration. It is the right of an execution creditor to have his execution carried into effect. In the case, indeed, of a disputed bankruptcy, where a distinct issue at law may be tried, execution has sometimes been stayed till after such trial; but where partners of the debtor have applied for time to be given to the sheriff till an account could be taken of the debtor's interest, or the claims upon the partnership, it has been held

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that execution ought not to be suspended for those purposes : *Parker v. Pistor* (1), *Chapman v. Koops* (2). It makes no difference that the application here proceeds from the sheriff. The situation of a sheriff executing process against goods to which there are adverse claims is too favourably considered in *Bevan v. Dawson* (3), and more justly in *Carlisle v. Garland* (4). Here, he must exercise his own discretion.

Knowles, contra, was stopped by the Court.

PATTESON, J. (5) :

When this case was before the Court on the rule under the Interpleader Act, the plaintiff did not dispute the fact of the goods being partnership property. If he had, the case would have been within the Act, and we should have granted a rule accordingly. Now he refuses to admit the partnership, and calls upon the sheriff to sell at his own risk. He has mis-

[*134] conducted himself towards the Court, and we *shall interfere for the sheriff's protection. The rule must be absolute.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule absolute.

1835.
Nov. 11.

REX v. THE INHABITANTS OF HATFIELD.

(4 Adol. & Ellis, 156—167.)

[156]

By an Act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the Act were directed, in their award, to make such orders as they should think necessary and proper concerning all public roads, "and in what township and parish the same are respectively situate," and by whom they ought to be repaired.

The commissioners by their award directed that there should be certain roads. One of these, called the Sandtoft Road, passed between new allotments. The road was ancient. The part of the common over which it

(1) 3 Bos. & P. 288.

(4) 7 Bing. 298.

(2) 6 R. R. 788 (3 Bos. & P. 289).

(5) Lord Denman, Ch. J., was absent.

(3) 6 Bing. 566.

ran, before the award, was in the township of H., and the road was still in that township unless its situation was changed by the local Act and the award. The new allotments on each side were declared by the award to be in other townships than H. The award did not say in what townships the road was situate, nor by whom it was repairable.

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HATFIELD.

Held, that the Act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of road, and therefore that the road in question continued to be in H.

Held, by Lord DENMAN, Ch. J., that where the herbage of a road becomes vested, by the General Inclosure Act (41 Geo. III. c. 109), sect. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors.

Held, further, by the whole Court, that, under sect. 9 of the General Inclosure Act, a road continued, as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in Special Sessions to be fully completed and repaired, before the inhabitants of the district can be indicted for not repairing it.

INDICTMENT against a township for non-repair of a highway. Plea, as to part of the road, Guilty: as to the residue, Not guilty. On the trial before Lord Denman, Ch. J., at the Yorkshire Summer Assizes, 1838, a verdict was given for the Crown, subject to the opinion of this Court upon the following case:

The road in question is the road described and defined in the award hereinafter mentioned, in the following terms: "One other public road of the breadth of forty feet, branching out of the said Bawtry and Selby Road, near Bearswood Green aforesaid, and proceeding, in an easterly direction, over a certain common called Ferne Carr, to Stoopers Gate, leading to Sandtoft; and which road we call Sandtoft Road." The boundary, on one side, of the road so described, formed, before the inclosure, the boundary of an ancient highway passing over the said common called Ferne Carr, in the same direction as the road above described, and the part of the common over which the road passed was then within the township of Hatfield. The ancient highway on the other side was open to the common without any defined boundary. By an Act, 51 Geo. III. c. xxx. (private), entitled "An Act for inclosing lands in the parishes of Hatfield, Thorne and Fishlake, in the manor of Haitefield, in the West Riding of the county of York," after certain recitals, it was enacted, s. 39, that, after the common wastes in the Act before mentioned should have been

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well and effectually drained, and the roadways and lands for sale set out and disposed of, and the several allotments in the Act before mentioned should have been set out and allotted, the commissioners appointed by the Act should in the next place assign, allot, set out, and divide the residue of such commons and waste grounds, one half among the owners of ancient messuages, cottages, &c., situate within the townships of Hatfield, Thorne, Fishlake, Stainforth, and Sykehouse, having right of common on the waste, and the remaining half among the owners of inclosed and open field land, meadow, &c. (with certain exceptions, not material here), in lieu of all rights of common and other interests of the said several owners in and upon the said commons and waste lands. And that all allotments made in respect of messuages, cottages and lands, &c., situate and being within the said township of Hatfield, together with &c. (certain allotments and parcels which need not be specified), should for ever thereafter be deemed and taken to be part and parcel of the said township of Hatfield. The like enactments were made respectively as to the several allotments in right of premises in the several other *townships; and it was enacted that all allotments from and out of the common wastes within the manor of Haitefield should, from and after the execution of the commissioners' award, be, and be taken to be, situate within the respective parishes and townships wherein the commissioners should, in and by the said award, allot, set out, and declare the same.

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Section 55 directed the commissioners to make their award, which amongst other things was to contain "all such orders and directions as the said commissioners shall think necessary and proper concerning all public roads, ways, and drains, and in what township or parish the same are respectively situate, and by whom such roads, ways, and drains ought to be maintained and repaired."

The commissioners made their award, and thereby directed that there should be certain public roads over the commons in the said Act mentioned, and amongst others the road in question, by the descriptions thereof above set forth. This road, beginning at the Bawtry and Selby Road on the west, runs for 122 yards

between ancient inclosures in the township of Hatfield; and as to that part the defendants pleaded Guilty. It then proceeds for 572 yards between new allotments, declared by the said award to be in the township of Hatfield, on the south, and new allotments, declared to be in the township of Thorne, on the north side; as to that, the defendants pleaded Guilty as to the part on the south side as far as the middle of the road, and Not guilty as to the residue. The remainder of the road indicted runs between new allotments declared to be in the township of Thorne on the south side, and the townships of Thorne, Fishlake, and Sykehouse, *on the north side; as to that the defendants pleaded Not guilty. But the award omits to direct in what parish or township the roads shall be respectively deemed to be situate, or by whom such roads ought to be maintained and repaired. It did not appear on the trial by whom the road in question had been repaired. The prescriptive liability set forth in the indictment, and the fact of the indicted road being out of repair, were proved at the trial: but the prosecutors did not produce in evidence any such certificate of justices of the peace as is mentioned in the General Inclosure Act, stat. 41 Geo. III. c. 109, s. 9.

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The point reserved was, whether, under the circumstances stated, the township of Hatfield is liable to repair the whole of the indicted road, or only such parts of it as adjoin and lie nearest to the ancient inclosures situate in the township of Hatfield, and the new allotments which by the award are declared to be in the township of Hatfield, as to which parts the defendant pleaded Guilty as above-mentioned. If the Court should be of opinion that the township was liable to repair those parts only as to which there was a plea of Guilty, a verdict of Not guilty was to be entered: if the Court should think that the liability of the township to repair the said road extended beyond these parts, the verdict was to be entered accordingly.

[After argument:]

LORD DENMAN, Ch. J.:

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The commissioners have not performed their duty, in omitting to declare, as the fifty-fifth section of the local Act directed

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them to do, in what township or parish the road in question was situate; and we are, consequently, left to decide this case under perplexing circumstances. I am of opinion, upon the merits of the case, that there is nothing to take away the liability of the township of Hatfield. It is suggested that, in the General Inclosure Act, sect. 11, which gives the herbage on the road to the proprietors of the land on each side respectively, a presumption is recognised like that in *Doe d. Pring v. Pearsey* (1), that the soil of the road belongs also to the same respective proprietors; and it appears to be inferred that the soil on each side of the road must be considered as passing to the same townships in which, by the local Act, the neighbouring allotments are placed. But I do not think that any legal presumption can arise as to the ownership of soil in a road, where the road is defined for the first time under a newly-created authority. Then it is urged that the road must be considered,

[*165] *for the present purpose, as part of the several allotments of which it forms the boundary. But it is clear that, in the local Act, the allotment is contemplated as distinct from the road; for the Act, by sect. 39, directs that, after the roadways and lands for sale shall have been set out and disposed of, the residue of the commons and wastes shall be assigned and allotted among the owners of messuages, having right of common, and the owners of inclosed and open field land. The merits of the case, therefore, are in favour of the liability of Hatfield. But the point raised as to the want of a certificate is not to be got over; and we must hold the defendants not liable, because the requisitions of stat. 41 Geo. III. c. 109, s. 9, have not been complied with.

PATTESON, J. :

I am of the same opinion. I am sorry that we must come to this decision; but the words of stat. 41 Geo. III. c. 109, s. 9, are too plain to admit of any other. By that section, the commissioners are to provide for the first forming and completing of such parts of the carriage roads to be set out, as shall be newly made, and for putting into complete repair such part of the

(1) 31 R. R. 209 (7 B. & C. 304).

same as shall have been previously made. The clause, therefore, exactly meets this case. And, if so, there must be a certificate of justices before the township or parish can be called upon to repair. Upon the merits I quite agree in the opinion which my Lord has given. We cannot say that the road is part of the adjoining allotment, when the General Inclosure Act says (in sect. 11) that the roads and ways not set out shall be stopped up and extinguished, and shall be deemed and taken as part of the lands to be divided, allotted, and enclosed, and shall be divided, allotted and inclosed *accordingly. The road cannot be an adjunct to the allotment. It remains then in the same situation as before the inclosure.

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WILLIAMS, J. :

I also am of opinion that this road remains in the same township in which it was before. I think it sufficiently appears that the road was originally in Hatfield ; and then the only question on this part of the case is, whether anything has occurred to vary, and transfer to some other district, the liability under which Hatfield was to repair. I think it is clear that nothing has taken place which can have that effect. It seems to me that the fifty-fifth section of the local Act makes the declaration of the commissioners, there mentioned, a condition precedent to the charging of any new district with repair of a road under that statute. But, as to the necessity of a certificate, I agree with the rest of the Court.

COLERIDGE, J. :

I think that the defendants are entitled to an acquittal, on the objection taken as to a certificate. The road in question has no existence for the present purpose, unless it be "set out as aforesaid," according to the eleventh section of the General Act ; and under sect. 9, every road to be set out, as is there mentioned, must be declared by justices, in petty sessions, to be sufficiently formed, completed and repaired, before the inhabitants of the district shall be liable in respect of it. Unless, therefore, the words "set out" mean differently in sections 9 and 11, a certificate of justices was necessary before the defendants could be

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charged. Upon the merits, the verdict must have been for the Crown. If the case shews clearly (as I think it *does, though not by express words) that the road in question was within the township of Hatfield, the inhabitants were liable, unless something had been done by the local Act, or by the award, to take it out of the township. Nothing of that kind appears. The Act changes the locality of the allotments only; and I think we cannot entertain the presumption suggested, that the adjoining road is transferred with them. We have no right to shift burdens in that manner.

Judgment for the defendants.

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REX v. THE MARCHIONESS DOWAGER OF DOWNSHIRE.

(4 Adol. & Ellis, 232—240; S. C. 5 N. & M. 662.)

An indictment for obstruction of a public way, describing it as from A. towards and unto B., is satisfied by proof of a public way leading from A. to B., though turning backwards between A. and B. at an acute angle; and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated.

B. was a church: the path from A., after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle: Held by Lord DENMAN, Ch. J., and *semble*, per COLERIDGE, J., that this proof would not have supported an indictment describing the whole as an immemorial way.

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INDICTMENT for obstructing “a certain common and public footpath, leading from the turnpike road from the parish of Ombersley to the parish of Holt, in the county &c., towards and unto the parish church of the said parish of Ombersley.” Plea, Not guilty. On the trial before Williams, J., at the Worcester Summer Assizes, 1834, the obstruction was proved; but a question arose whether the path, shewn to be obstructed, answered the description in the indictment. The path *commenced at a point in the turnpike road from Ombersley to Holt, and thence was continued to a gate opening into an inclosure, on the western side of that inclosure. The obstruction was between this gate and the point before mentioned. The inclosure contained the

site of the old parish church of Ombersley, which had been pulled down, and the new parish church, which had been erected, and was made the parish church, under an Act of Parliament (54 Geo. III. c. cexviii., local and personal, public). From the gate on the western side, a path passed through the inclosure between the two sites, leaving the site of the old church on the right, and the new church on the left, to a gate on the eastern side of the inclosure, and so to the village of Ombersley. Persons entering by the western gate, going to the old church, turned off to their right from this path, after entering the inclosure, and went to the old church by a path in a south-eastern direction, forming an obtuse angle with their previous course. Persons entering at the western gate, and going to the new church, followed the easterly direction further on, and then turned off to their left, by a gravelled path, in a north-western direction, forming an acute angle with their previous course, and coming up to the new church itself. Sometimes, however, persons going to the new church, almost immediately after entering the western gate, quitted the path running through the inclosure from west to east, and, turning to the left, crossed the churchyard to the new church in a north-eastern direction, forming an obtuse angle with their previous course, and some evidence was given to shew that the grass, on the part of the churchyard traversed by this last-mentioned route, was kept mown for the convenience of persons frequenting *the new church; but this was not fully established. The spaces round the sites of the old church and the new church, on the right and left respectively of the path from the western to the eastern gate of the inclosure, were called respectively the old and new church yards, but they were open to each other, and both within the one inclosure. The path, from the point in the road from Ombersley to Holt to the western gate of the inclosure, was an immemorial public path, and so was the path leading from west to east through the inclosure, and that connecting the last-mentioned path with the old church; but the public paths, if any, connecting the path from west to east with the new church, did not exist before the new church was built. The defendant's counsel objected that the parish church, mentioned in the

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indictment, must be considered to be the new parish church : and that the evidence did not shew that this was a terminus. His Lordship took a note of the objection, and permitted the case to proceed : and he finally left it to the jury, whether the path up to the new church had been dedicated to the public. Verdict, Guilty. In Michaelmas Term, 1834, *Jerris* obtained a rule to shew cause why the verdict should not be set aside, and a verdict be entered for the defendant, or a new trial be had, on the ground of misdirection.

[After argument:]

[238] LORD DENMAN, Ch. J. :

It appears to me that there has been no misdirection. There is a path answering to the description in the indictment, by which you may reach Ombersley church. It is true that in doing so you must describe an acute angle ; but that does not make a variance. *Rex v. Great Canfield* (1) is the only case

[*239] which *appears to raise the question of misdirection. But there, in order to reach the terminus by the path described, it was necessary to return back over the ground already passed. Here, no part is passed over twice ; but the objection is merely that, having reached a certain point, it is necessary to turn at an acute angle, and go on to the church by a different path. But this latter part of the path, though new, is as much a public path as the rest ; so that no difficulty arises in that respect. If the whole path were described as immemorial, there would certainly be a variance. As to the suggestion respecting a second indictment, and plea of *autrefois acquit*, I do not feel the difficulty : it would always be necessary to shew where the obstruction complained of in the former indictment took place.

PATTESON, J. :

I think there was no misdirection. I was struck with the argument, that part of the footpath in question was an ancient way, and part a way newly dedicated. But, upon consideration, I think that creates no difficulty. If it make up one entire road,

(1) 6 Esp. 136.

it is immaterial at what time the several parts became public. If, as in *Rex v. Great Canfield* (1), the description could have been satisfied only by going to a certain point, and then returning back by the same route, it would have been a different case: but here you go along an ancient highway, and make an angle backwards, but do not retrace any part.

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COLERIDGE, J.:

I am of the same opinion. If the path were claimed as an immemorial highway, I should *feel a difficulty; but that is not so. The user sufficiently makes them one, for the purpose of the indictment, provided the jury find that all is a public highway to the church, though a circuitous one. Perhaps it is rather in favour of the prosecution, that the attempt to shew a way over the grass failed; for the inference is stronger that the other route is the path.

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WILLIAMS, J.:

I thought the evidence sustained the allegations, and that there was no variance. The question comes shortly to this: do the words "towards and unto" imply any degree of directness? There is no rule which lays down that, because a road forms an acute angle in order to reach a terminus, it does not lead "towards and unto" the terminus.

Rule discharged.

BROWN AND OTHERS v. TAYLEUR.

(4 Adol. & Ellis, 241—250; S. C. 5 N. & M. 472.)

Insurance on a ship "at and from her port of lading in North America to Liverpool." She took in part of her cargo at K., in New Brunswick, and then sailed from thence to B., in the same province, seven miles distant, on the same bay of the sea. She there completed her cargo, and then returned to K. to receive provisions, &c., after which she sailed for England, and was lost on the voyage. B. was not in the way from K. to Liverpool. B. and K. were situate on creeks opening into the bay, and were spoken of by some persons as ports, but neither of them had a

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(1) 6 Esp. 136.

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custom-house. They had custom-house officers, and were under the jurisdiction of the custom-house of St. John, New Brunswick.

Held that, after the ship had begun to load at K., that was her port of lading; that the term "port of lading" in the policy did not allow of her afterwards going to B., and that her doing so was a deviation.

ASSUMPSIT on a policy of insurance. On the trial before Lord Denman, Ch. J., at the sittings in London after Trinity Term, 1884, it appeared that the insurance was upon goods and merchandize, and also upon the body, tackle, &c., of and in the ship *Penrith*, "lost or not lost, at and from her port of lading in North America, to Liverpool;" beginning the adventure upon the goods from the loading thereof on board, &c. A total loss was proved; but, upon the case for the plaintiffs, *Sir James Scarlett*, for the defendant, contended that there had been a deviation. The evidence on this point was as follows:

The *Penrith* was launched at Cocagne, in the province of New Brunswick, at the end of June, 1828. Her burden was 510 tons. A few days after she was afloat, she began to take in a cargo of timber at Cocagne, and she continued to do so for three weeks. The lower hold, which would contain from 400 to 500 tons, was loaded at Cocagne. During this time the vessel was described in evidence, as lying "in the stream, inside of the Cocagne bar." On the 1st of August she sailed from thence to Buktouche, described by different witnesses as five, and seven, miles distant, to complete her loading. She arrived there in a few hours. Cocagne and Buktouche are situate on different creeks of the same bay. Buktouche is not in the line of voyage from Cocagne to Liverpool. *The *Penrith* lay off Buktouche three weeks to take in the residue of her cargo, and returned to Cocagne on the 22nd of August to receive provisions, water and wood, and to get the ship ready for sea; but she took no additional cargo, unless (which was mentioned as doubtful) a few pieces of timber on the deck. She sailed for England on the 31st of August, and was lost on the voyage. Cocagne was spoken of by witnesses as a "harbour," and a "port," and Buktouche as a "port," but neither had a custom-house, though there were officers of customs at both places, and it appeared that both were within the jurisdiction of the custom-house of St. John, New Brunswick. The *Penrith*, though built at Cocagne, was registered at the port of St.

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John (1). The letter ordering the insurance was dated August 25th, 1828.

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The LORD CHIEF JUSTICE gave leave to move to enter a nonsuit on the objection taken, and the plaintiffs had a verdict. In the following Term a rule *nisi* was obtained for entering a nonsuit, or for a new trial upon grounds which it is unnecessary to notice, as the decision of the Court did not turn upon them.

[After argument:]

LORD DENMAN, Ch. J.:

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I think that the rule for a nonsuit must be absolute. It was clear, on the close of the evidence for the plaintiffs, that Cocagne and Buktouche were two distinct places, and two places at each of which there might be a lading. There was no technical meaning to be attached to the words "port of lading." If it could have been shewn that the two places were in reality one, the plaintiffs should have produced evidence to that effect. My only doubt was, whether there should have been a nonsuit, or whether the defendant should have been called upon to give evidence on the subject; but as the plaintiffs themselves have made out a *prima facie* case of distinctness, I think the defendant is entitled to a nonsuit.

PATTESON, J.:

I am of the same opinion. We cannot construe the words "at and from her port of lading," as if they were "at and from her ports;" the expression used points out one single place. Nor can we adopt the *technical meaning which may be ascribed to "port," as signifying all that is subject to one custom-house, or one port jurisdiction; the result of which would be that a ship, under such a policy as this, might sail to every part of a district so situated. The cases which explain the meaning of the word

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(1) It appears on reference to a map, that St. John is on one side, Cocagne and Buktouche on the other, of the neck of land which joins New Brunswick to Nova Scotia. St. John is on the bay of Fundy. Cocagne

and Buktouche are in the gulph of St. Lawrence, each at the mouth of a river. The distance from St. John to Cocagne by land appears to be about 100 miles, in a direct line.

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“port,” as here used, are not many. There is one (1), where a brigantine was insured to Barcelona, and at and from thence, and two other ports in Spain, to a port in Great Britain; and she put into a place situate in the recess of a bay, having a custom-house and port captain, and having also warehouses, and a jetty, with accommodation for small vessels only, there being, however, convenient anchorage for large ones in the roadstead; and, the ship having been lost in the roadstead, this was held to be a port within the meaning of the policy. Here, I think that “port” means the same as place, and that the vessel’s place of loading must be one place. When she had once begun to take her cargo at Cocagne, that was her place of lading, and her removal afterwards to Buktouche was a deviation. The cases of insurance at and from Jamaica, and Grenada, do not apply. There the words used would comprehend all places in the island. If the policies in those cases had said “at and from her port of lading in Jamaica” or Grenada, the commencement of the voyage would have been restricted to one particular place. That the two places here are within the jurisdiction of a single custom-house, makes no difference. If that entitled the ship to go from one to the other, she might also have gone to St. John. In construing the word “port” as the place of lading, *I do not mean to say that, if a ship were at a particular quay on a river, as at Liverpool, and merely removed to another quay a mile or two off, that would be a deviation, because the vessel there would be all the time in one port and place; but it is a deviation if she removes to a different town, a different place of habitation, and a point which might itself be her place of lading. As to the date of the letter, the policy would attach when the vessel began to load; and, if an unknown loss had happened before the writing of the letter, it would be covered by the policy. I think that there ought to be a nonsuit, because further evidence could not have altered the state of facts, or, if it could, the plaintiffs should have offered it when a nonsuit was applied for.

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WILLIAMS, J.:

The word used in the policy is “port” of lading, in the

(1) *Sea Insurance Company of Scotland v. Gavin*, 33 R. R. 77 (4 Bligh (N. S.) 578; 2 Dow & Clark, 125).

singular number: we cannot construe that as ports. And the moment the taking in of the cargo was begun at Cocagne, that was to be considered as the port of lading designated. Had evidence been given that, for purposes of this kind, Cocagne and Buktouché formed in fact only one place, the case would have been different. But if, by means of the construction attempted, places at a distance from each other can be included under the term "port of lading," what rule of restriction can be laid down? May the places be fifty, or a hundred miles apart? "Jamaica," and "Grenada," in the cases which have been referred to, signified the whole of those islands. It would have been a violence there to limit the meaning of the policy to a single port. Here, nothing warrants the extension insisted upon.

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COLERIDGE, J.:

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There must be a nonsuit in this case, unless we are prepared to say that "port" is equivalent to "ports," or to "port or ports." The plaintiffs must contend that it is an aggregate term, comprehending every member of a port, together with the chief port itself. But I think we are not at liberty here to construe the word with reference to custom-house regulations, but must consider it merely as indicating a place. Looking at it in this way, can we regard "port" as an aggregate term, comprehending a number of neighbouring places? I think not, and for this reason among others, that it makes a difference in the risk whether a ship stays at one place to load, or goes on a roving voyage to pick up a cargo. It is important in these matters that parties should come to a plain understanding; and if it is meant that a vessel should have the liberty of going to a number of places, though near each other, the party insuring had better express it so, than run a risk, at least, of deceiving the underwriters.

Rule absolute for a nonsuit (1).

(1) See, as to the construction of the word "port," *Kingston-upon-Hull Dock Company v. Browne*, 36 R. R. 459 (2 B. & Ad. 43).

1835.
Nov. 20.

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DOE D. HIGGS AND OTHERS, CHURCHWARDENS AND
OVERSEERS OF THE PARISH OF ST. MARY, READ-
ING, *v.* TERRY, SIMONDS, AND FORD.

(4 Adol. & Ellis, 274—283; S. C. 5 N. & M. 556; 5 L. J. (N. S.) M. C. 27.)

In ejectment on the demise of the churchwardens and overseers of a parish, laid after the passing of stat. 59 Geo. III. c. 12 (1) (the seventeenth section of which vests all real property belonging to the parish in the churchwardens and overseers in succession, as a corporation), the lessors of the plaintiff proved that the defendant, ever since the passing of the statute, and for many years before, had paid rent to the churchwardens of the parish for the time being, and that the late churchwardens and overseers (who came into office after the statute passed) had given him notice to quit.

Defendant produced a lease for years, by T. K. and J. K., therein described as churchwardens of the parish, to W. E., made before the statute, in consideration of the surrender of a former lease; and also a lease for a term of years, yet unexpired, made before the statute, by J. M. and N. C., described as churchwardens of the parish church, to W. E.'s personal representative, through whom defendant claimed, in consideration of the surrender of the lease first mentioned. In the last-mentioned lease the premises were described as "belonging to the parish church," and the rent was reserved payable to "the said churchwardens and their successors."

On a special case, stating these facts: Held,

That the property appeared to be parish property; that the leases passed no legal interest; and that the property, since the statute, was in the churchwardens and overseers in succession, who were intitled to treat the defendant as tenant from year to year, and to recover the premises upon giving notice to quit.

EJECTMENT for messuages and premises in the parish of St. Mary, Reading, in Berkshire. The demise was laid on the 1st of May, 1834, and described the lessors of the plaintiff by their names and as the churchwardens and overseers of the poor of that parish for the time being. On the trial before Alderson, B., at the *Berkshire Summer Assizes, 1834, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:

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The lessors of the plaintiff were the churchwardens and overseers of the poor of the said parish, at the times of the action being commenced, and of the demise in the declaration. A rent of 1*l.* 10*s.* per annum had been paid by the predecessors of the defendants in the tenancy to the successive churchwardens of the

(1) See also the Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 5.—R. C.

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parish for many years before the passing of the stat. 59 Geo. III. c. 12; and, since that Act came into operation, the rent had continued to be paid in like manner by the predecessors of the defendants, and by the defendants, until the expiration of the following notice. On the 23rd of March, 1833, a notice to quit (of which the following is a copy) was duly served on the several defendants. "To Messrs. John Terry, &c. You are hereby required to quit," &c., "all that messuage, tenement, or dwelling-house," &c., "situate," &c., "which you now hold of the churchwardens and overseers of the poor of the parish of St. Mary, Reading, to the churchwardens and overseers of the poor of that parish, on Michaelmas Day next, or at the expiration of the current year of your tenancy. Dated the 20th day of March, 1833. JOHN OKEY, RICHARD MUNT, churchwardens of the said parish. W. WINKWORTH, JOHN WHEELER, W. H. TYHURST, overseers of the poor of the said parish."

The persons who signed this notice filled at the time the offices which they are described as filling, but had gone out of office before this action was commenced.

The defendants deduced the following title. A lease was put in, dated 23rd April, 1753, made between *Thomas Knapp and John Knott, churchwardens of the parish of St. Mary in Reading, Berks, of the one part, and William Earles of the same parish, of the other part: probate of the will of the said William Earles, dated 1st November, 1765: and an indenture, dated 2nd October, 1801.

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By the indenture of lease of 23rd April, 1753, Knapp and Knott, in consideration of the surrender of a former lease, of which about twelve years were then unexpired, and also of a fine of 20s., demised the premises now sought to be recovered to Earles, for fifty-one years from Lady Day, 1753, at the yearly rent of 30s.

The said lease, by virtue of the will of 1st November, 1765, and the indenture of 2nd October, 1801, became vested in Mary Searle.

A lease was also put in by the defendants, dated 29th April, 1802, between John Moore and Nathaniel Clissold, churchwardens of the parish church of St. Mary in Reading, of the one

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part, and Mary Searle of the other part, whereby, in consideration of the lease granted to Earles (of which two years were then unexpired), and of a fine of 70*l.*, the premises in question, therein described to be parcel of the lands and tenements belonging to the parish church of St. Mary in Reading, were demised to the said Mary Searle, her executors, administrators and assigns, to hold from the feast day of the Annunciation then last for fifty-one years, paying yearly to the said churchwardens and their successors the rent of 30*s.*

The defendants were the legal representatives of Mary Searle.

[*277] The lessors of the plaintiff contended that the last-mentioned lease was void ; that the estate and interest *in the premises had vested in the churchwardens and overseers of the poor of St. Mary, Reading, by the operation of the statute ; and that the defendants' only interest therein had been as tenants from year to year, which the notice to quit had determined.

[After argument:]

[280] PATTESON, J.:

[*281] My difficulty has been to see how this property is shewn to be parish property. One would expect to have its history previous to the lease. In *Doe d. Jackson v. Hiley* (1) all the facts appeared : there were feoffees of a legal estate held in trust for the payment of church rates, and a lease of which the validity was admitted, and which had expired before the ejectment was brought. There was one demise by the feoffee's devisee ; but certainly Lord TENTERDEN's judgment is upon the demise by the parish officers, on the ground that the parish property was transferred from the party who had the legal ownership at the time of *the passing of stat. 59 Geo. III. c. 12, to the parish officers, by that Act. Now here it does not appear who had the legal property at the time of the Act passing. My doubts, however, are removed by the fact that the payments of rent have been made to the churchwardens as such. The property, therefore, belonged to the parish in the popular sense, and in the sense of the Act. And, therefore, upon the authority of *Doe d. Jackson v. Hiley* (1), it now belongs to

(1) 34 R. R. 591 (10 B. & C. 885).

the churchwardens and overseers as a corporation. They received the rent : the defendants must be held to know the law, and to have paid to them in the character of a corporation. Then, this being a freehold estate, the question is whether the defendants held it as tenants from year to year, or on lease. We collect from the case that the parties demising were churchwardens ; we must take it that they were the then existing churchwardens. But their demise passed no legal interest in the term, for churchwardens could not then hold land as such. No estoppel therefore was created as against their successors. It is not material to consider whether there was an estoppel as against the individuals ; for the lessors of the plaintiff clearly do not claim by privity to the grantors. If they did, they could sue in covenant, describing themselves as assignees of the reversion ; but that they could not do, because the churchwardens had no reversion. No legal interest, consequently, passed in the term. This is, therefore, a case of tenant from year to year who has received notice to quit ; and there must be judgment for the plaintiff.

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WILLIAMS, J. :

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I am of the same opinion. The doubts which I felt are removed by the documents and by the payments of rent. Both in the lease of 1753, and in that of 1802, the parties granting are described as churchwardens ; and, in the latter lease, the premises are described as belonging to the parish church. Upon this a strong presumption arises, not, as my brother *Ludlow* suggests, that the grantors were trustees demising in their individual character ; but one which is much more admissible, when we bear in mind the parties so demising and the property demised, namely,—that this was parish property. In addition to this, we have the continual payment to the parish officers for the time being ; which renders the presumption conclusive and overpowering. Then, having got so far, do we find any estoppel ? Clearly not : the lessors of the plaintiff are utter strangers to the grantors of the lease. The payment of rent would not constitute a sufficient case, if it were not aided by the statute. But, as this is parish property, and as there is nothing to prevent the operation of the statute, the plaintiff is entitled to our judgment.

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COLERIDGE, J. :

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The only question is, whether there be a *prima facie* case for the lessor of the plaintiff; for, if so, there is no answer to it. If the property be shewn to belong to the parish, but not else, there is a *prima facie* case. Then does it so belong, or not, within the meaning of the Act? You must take the words of this Act in the popular sense: for, in the strict sense, lands do not belong to a parish. The case for the defendants helped out the plaintiff's case, by shewing that the grantors of the leases called themselves churchwardens. And the *payments have, in fact, been made to the successive churchwardens. Then is not this parish property? It comes then to a case of landlord and tenant.

Judgment for the plaintiff.

1835.
Nov. 23.
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FRANCIS COOKE ROGERS v. JOHN HUMPHREYS.

(4 Adol. & Ellis, 299—316; S. C. 5 N. & M. 511; 1 H. & W. 625;
5 L. J. (N. S.) K. B. 65.)

A mortgagee, after default in payment by the mortgagor, has (if he think proper to exercise them) the same rights against a tenant by lease granted before the mortgage, as the mortgagor had, and may take his remedy on such lease, as assignee of the reversion. If the lease was made by the mortgagor subsequently to the mortgage, the mortgagee may treat the tenant as a trespasser, but cannot distrain, or sue for rent, unless he has accepted rent from the tenant, or has given him notice to pay rent, and the tenant has acquiesced.

A deed to lead the uses of a recovery, after reciting that the premises were to be conveyed for the purpose, among others, of securing payment of 800*l.* advanced by J. H. to M. R., tenant in tail in remainder, declared the uses as follows: To H. and L., their executors, &c., for 1,000 years, to commence from the day before the date &c., in trust (subject to the powers, &c., after mentioned), upon nonpayment of the 800*l.* and interest, to sell or mortgage, and pay that sum to J. H.: and, from and after the determination of that term, and subject meantime thereto, and to the trusts thereof, to E. R., mother of M. R., for life: remainder to T. L., his executors, &c., for 2,000 years, to commence from the day of the decease of E. R., in trust to levy and repay such sums as E. R. should during her life pay to J. H. for interest on the 800*l.*, and to suffer the person next in remainder or reversion expectant on the first term to receive the residue of rents not applied in executing the trusts of the latter term: remainder, and in the meantime subject thereto, to such uses as M. R. should appoint, and, in default of appointment, to

him for life: remainders to his sons and to his daughters in tail; remainders over.

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A power was then reserved to E. R. to demise the premises for ten years from the date of the deed, or seven years from the day of her decease, reserving the best rent, &c.

E. R. demised the premises to a tenant for seven years from the day of her decease, reserving rent "to M. R., or the person for the time being entitled to the freehold or inheritance of the premises immediately expectant" on the decease of E. R. She died, and the lessee entered. M. R. died shortly afterwards, and left a daughter. Afterwards the trustees of the terms of 1,000 and 2,000 years assigned them to J. H., default having been made in the payment of his 800*l*.

Held, that the seven years' lease granted by E. R., being made under a power created by the deed of uses, must be deemed contemporaneous with the term of 1,000 years created by the same deed, and binding on the trustees of that term, who were parties to the deed, so that they could not disturb the possession.

That the trustees of that term, though not "entitled to the freehold or inheritance," were the reversioners entitled to the rent reserved by the lease, and, consequently, that their assignee might distrain for it.

And this, although an ejectment had been brought against the lessee, on the demises, among others, of the last-mentioned trustees (laid previously to their assignment to J. H.); there having been no judgment, nor any actual eviction of the lessee.

The Court, after giving the above decisions on a special case, ordered judgment to be entered up for the successful party for half a year's rent. On application of that party in the next Term, it appearing, on reference to the special case and *postea*, that the rule for judgment should have been for a year's rent, and no judgment having yet been entered up, the Court, after cause shewn, amended the rule on payment of costs.

REPLEVIN for cattle, goods, and chattels, taken October 14th, 1833. The defendant avowed the taking of the cattle, goods, and chattels, as a distress for rent due and in arrear from the said plaintiff to the said defendant, and averred that it became payable on the *20th of May and 20th of November in every

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year. Plea, *non tenuit*; and issue thereon. On the trial before Patteson, J., at the Spring Assizes for Shropshire, 1834, the defendant had a verdict for 150*l*., the amount of the rent in arrear (1), subject to the opinion of this Court on the following case.

(1) So stated in the introduction to the special case.

were to be considered as part of the case.

(2) The several deeds referred to

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of the first part; Milward Rogers, tenant in tail in remainder of the same premises, of the second part; William Henry Rosser, of the third part; John Williams, of the fourth part; John Humphreys, the defendant, of the fifth part; William Humphreys and Thomas Lloyd, of the sixth part; and Thomas Lloyd, of the seventh part; after reciting (1) that John Humphreys had agreed to lend Milward Rogers 800*l.* on the security of his bond, and of the hereditaments after-mentioned and referred to in that recital, which 800*l.* John Humphreys had paid to Milward Rogers; it was witnessed that, for barring all estates tail in the hereditaments after mentioned, Elizabeth Rogers and Milward Rogers did convey to Rosser the premises in respect of which the distress was taken, to the intent that he might become tenant to the *præcipe* for suffering a common recovery, wherein Williams should be demandant, Rosser tenant, and Milward *Rogers vouchee. And it was agreed that the said recovery, and those presents, and all other conveyances and assurances to be made or suffered by and between all or any of the parties, should enure to the use of the said William Humphreys and Thomas Lloyd, their executors, administrators, and assigns, for the term of 1,000 years, to commence from the day next before the day of the date thereof, but nevertheless upon the trusts, &c., and subject to the powers, provisoes, &c., thereafter expressed: and after the determination of the said term, and in the meantime subject thereto and to the trusts thereof, to the use of Elizabeth Rogers for life, without impeachment of waste; remainder, from and after her decease, or other sooner determination, &c., to the use of the said T. L., his executors, &c., for the term of 2,000 years, to commence from the day of the decease of E. R., or other, &c., upon the trusts after declared; remainder, after the determination of the said estate, and in the meantime subject thereto, and to the trusts thereof, to such uses as Milward Rogers should appoint, with the consent in writing of certain parties, in manner therein mentioned; and, in default of such appointment, or so

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(1) It was also recited, that Milward Rogers was desirous of discharging the premises from all estates tail, remainders, &c., and that Eliza-

beth Rogers, in consideration of natural affection for her son Milward Rogers, had agreed to join him in making a tenant to the *præcipe*.

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far as the same should not extend, to the use of M. R. for his life without impeachment of waste; remainder to the use of trustees to preserve contingent remainders; remainder to the use of the first and other sons successively of M. R. in tail general; remainder to the use of the daughter and daughters of the said M. R. in tail general, share and share alike as tenants in common, &c.; remainders over; and ultimate remainder to the use of the right heirs of M. R. Proviso that, in such conveyance or conveyances as aforesaid, it should be provided and declared to be *lawful for Milward Rogers to appoint as before-mentioned, without such consent in writing as before required, provided such appointment were by way of sale or mortgage, and the purchase-money or loan should not exceed 200*l.* over and above the 800*l.* secured to John Humphreys. And, as to the term of 1,000 years, it was declared that the same was limited to W. Humphreys and Lloyd upon trust that, on non-payment by Milward Rogers of the 800*l.* and interest to John Humphreys on the 25th of March then next, it should be lawful for the trustees, by sale, mortgage, or other disposition of the premises, at the request of John Humphreys, to levy, and pay to him, the 800*l.* and interest. And, as to the term of 2,000 years, to levy in the same manner such sums as Elizabeth Rogers should, during her life, pay to John Humphreys for interest on the 800*l.*, and also a further sum of 600*l.*, and to pay the same in manner therein mentioned: and upon further trust to permit the person next in remainder or reversion expectant on the term of 1,000 years to receive the residue of the rents and profits remaining after, and not applied in execution of, the trusts declared of the last-mentioned term: proviso that, when the trusts of the two terms should have been executed, and the costs of the trustees paid, the two terms should cease. And it was declared and agreed that it should be lawful for Elizabeth Rogers to demise all or any part of the premises for any term not exceeding ten years from the date of the present indenture, or seven years from the day of her decease, to take effect in possession, so as there should be reserved the best rent that could be gotten without premium, and so as the lease should contain certain *conditions for re-entry on non-payment of rent, for good husbandry, &c. There were also covenants by Milward

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Rogers to W. Humphreys and Lloyd for title, &c.; and for entry by them without let from Elizabeth Rogers or Milward Rogers on non-payment of the 800*l.* or interest.

The recovery was duly suffered. Milward Rogers (by indenture of June 13th, 1831) appointed in fee in pursuance of the power reserved to him, to secure the payment of 200*l.*, subject nevertheless to the life estate of Elizabeth Rogers, to the mortgage to John Humphreys, and to a proviso for redemption.

By indenture of lease, September 17th, 1831, after reciting the indentures of September 24th and 25th, 1830, Elizabeth Rogers, by virtue of the power given to her by the last-mentioned deed, demised the premises aforesaid to the plaintiff for the term of seven years, to be computed from the day of her decease, paying to Milward Rogers or the person or persons who for the time being should be entitled to the freehold or inheritance of the demised premises immediately expectant on the decease of Elizabeth Rogers, the yearly rent of 150*l.* by two equal half-yearly payments, the first to be made at the end of six calendar months next ensuing the day of her decease (1).

Elizabeth Rogers died, 20th November, 1831, when the plaintiff, by virtue of the lease to him, took possession, which he retained until the distress. Milward Rogers died June 25th, 1832 (without having appointed in pursuance of the power reserved to him by the indentures of September 24th and 25th, except as above mentioned), leaving an infant daughter, Emma Rogers.

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By indenture, July 30th, 1832 (2), W. Humphreys and Lloyd assigned to the defendant the term of 1,000 years; and Lloyd also assigned to a trustee for him the term of 2,000 years.

In October, 1832, the plaintiff paid Mary Rogers, the widow of Milward Rogers, 75*l.*, half a year's rent from the death of Elizabeth Rogers; and at Christmas, 1832, he tendered to the

(1) See, as to the other particulars of this demise, *Doe d. Rogers v. Rogers*, 5 B. & Ad. 755.

(2) Reciting that the 800*l.* and interest were not paid at the day appointed, that neither Elizabeth Rogers nor Milward Rogers had

paid any interest, and that Humphreys had requested of W. Humphreys and Lloyd an assignment of the term of 1,000 years by way of mortgage, and had agreed to advance to Lloyd 600*l.* and interest.

said Mary another half year's rent, which was not accepted. In Michaelmas Term, 1832, an ejectment was brought against the plaintiff and his tenants, on the demises (laid July 16th, 1832,) of the said Emma Rogers, of the said Mary Rogers and others, guardians of the said Emma, and of W. Humphreys and Lloyd, for the purpose of setting aside the lease of September 17th, 1831. The present plaintiff claimed in that action to hold under the last-mentioned lease. The ejectment was still depending when this case was stated. At the trial of the present cause, the defendant's counsel objected that the issue roll in the ejectment was not evidence against him, but the learned Judge admitted it. The case was argued in Hilary Term (January 20th), 1835 (1).

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* * * * *

LORD DENMAN, Ch. J. now delivered the judgment of the Court :

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After stating the substance of the deeds, *and the principal facts of the case, his Lordship proceeded as follows :

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A great many cases were cited at the Bar to shew what the rights of a mortgagee are, against the mortgagor and those claiming under him, where there is a lease prior to the mortgage, and also what they are when there is a lease subsequent to the mortgage, and which cases it is not necessary to cite or comment upon, as they establish this principle, that, if the mortgagor himself remains in possession, the remedy against him on default in payment at the day is by ejectment. And if there be a lease, and such lease is prior to the mortgage, the mortgagee has the same rights against the lessee and those claiming under him that the mortgagor had, and no other than he had, and his remedy must be on the lease as assignee of the reversion, as long as the lease is in existence, and the tenant acknowledges his title ; but if the lease be subsequent to the mortgage, then the mortgagee may treat the lessee and all those who may be in possession as wrong-doers, and may bring an ejectment, but he cannot distrain or bring any action for the rent they have contracted to pay, as there is no relation of landlord and tenant between them, unless they choose to pay the rent to the mortgagee, and he accepts it ; in that case there is a

(1) Before Lord Denman, Ch. J., Littledale and Williams, JJ.

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relation of landlord and tenant created between the mortgagee and the tenants, and the remedy of the mortgagee will depend upon the particular circumstances of each case; no notice is necessary to be given by the mortgagee that he means to proceed against such tenants, where they come in subsequent to the mortgage, because in such case their title is wrongful *as against the mortgagee; but there may be cases where, in consequence of the conduct of the mortgagee, notice may become necessary.

But this case differs from all the cases cited; for here the lease is neither prior to the mortgage, nor subsequent to it; but it is in point of law contemporaneous with it; for, though the lease is not in fact made till September, 1831, nearly a year after the mortgage, yet, as the lease is made under a power, it is referable to the instrument creating the power, and is derived out of it, and has the same effect as if it had been made under the instrument itself.

It is to be considered, in the first place, whether, being made conformable to the power as to the rent and other requisites, it is to be considered as binding on the trustees for the 1,000 years' term, so as that they could not disturb the lessee in the enjoyment of the land; and we have no doubt but it is binding on them. They are parties to the deed under which the lease is authorised to be executed; they assent to it and give it confirmation, and therefore they cannot disturb the lessee. They are not indeed entitled to an estate of freehold or inheritance in the technical sense of those terms; but we think the reservation is not to be so confined, but, if they are entitled to the rents, the reservation is sufficient to give them the legal interest in them, and that therefore they may distrain for the rent; and then, they having assigned their legal interest to John Humphreys, he may do so also.

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But it is alleged for the plaintiff that, even supposing the defendant has otherwise a right to distrain, he is precluded from doing so by treatment of the plaintiff as *a trespasser, manifested by the trustees, before the assignment to him, having joined with some of the family of the Rogers's in bringing an ejectment for the premises.

The right of entry is however denied by the plaintiff, and the parties are at issue upon it, and the matter is undecided.

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There are many cases where the conduct of a party is taken into consideration, where the question is, whether the person against whom he seeks to enforce his claim is to be treated as a person liable upon a contract, or as a trespasser; but here is a lease executed under the seal of the plaintiff, and, as long as he continues in possession, he is liable to the payment of the rent by the usual remedies which the law gives for the recovery of it. If he be actually evicted by a person claiming under a title, or if the lessor, or those claiming under him, or, as in this case, the trustees under the 1,000 years' term, had entered upon the plaintiff, that would be a good answer to the avowry; but in the present case there is not even a judgment in the ejectment, but only an action brought. And, there being no eviction, or re-entry, or surrender of the term, the lease is in existence, and there is nothing to prevent the defendant from avowing.

There is a very short abstract of the avowry in the special case: it is not stated for what length of time the claim is made; but it is to be collected, from the amount found by the verdict, that it is for a year: but this defendant can only claim for half a year; for the *trustees did not assign to him till after half a year's rent had become due.

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Judgment to be entered for the defendant, for 75l. (1).

(1) A summons was obtained after Term, to shew cause why the rule for judgment should not be amended; and, on the hearing before Little-
dale, J. the defendant urged that the rule ought to have been to enter judgment for 150l. and not 75l. But, it being contended on the other side that the rule of Court could not be altered by a Judge at Chambers, LITTLEDALE, J. dismissed the summons. On the first day of Hilary Term, 1836 (no judgment having been entered up), *Whateley* obtained a rule *nisi* for amending the rule of November 23rd, LITTLEDALE, J. observing that, upon reference to the *postea* and to the statement in the case, there was no doubt that the last-mentioned rule was erroneous

as to the sum. In the same Term, January 28th, *R. V. Richards* shewed cause, and contended that the rule complained of was a judgment of the Court upon the matter submitted to them, and, even if erroneous, could not be altered after the Term; and that the delay of the party to enter up judgment on the rule could not enlarge the power of the Court; to this it was answered that, no judgment having been entered up, a mere rule for judgment might, under the circumstances, be altered. *Mellish v. Richardson* in error, 7 B. & C. 819, was referred to.

The COURT (Lord DENMAN, Ch. J., LITTLEDALE, WILLIAMS, and COLERIDGE, JJ.) made the rule for amending absolute, on payment of costs.

1835.
Nor. 22.

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ALLENBY v. PROUDLOCK AND STOKER.

(4 Adol. & Ellis, 326—330; S. C. 5 N. & M. 636; 5 L. J. (N. S.) K. B. 45.)

In trespass *quare clausum fregit*, defendant pleaded to the whole action, (1.) Not guilty; (2.) Soil and freehold; (3.) Private right of way; (4.) Public right of way. By order of Nisi Prius, the cause was referred to a barrister, the costs to be in his discretion, and to be recovered as if they were costs in the cause. The fourth issue was withdrawn from the cause by consent; but the arbitrator was to decide on the costs of the cause as if it had remained. The arbitrator awarded that the verdict on the first and second issues should be entered for the plaintiff, with nominal damages, and the third for the defendant; and that the plaintiff should pay the defendant his costs in the cause, such payment to be made on the expiration of fourteen days from the taxation.

Held, that the plaintiff was entitled to his costs on the first and second issues, and that each party was to bear his own costs of the fourth issue; the award being tantamount to a direction that the costs in the cause should abide the event of the cause.

TRESPASS *quare clausum fregit*; the declaration bearing date before the first day of Easter Term, 4 Will. IV. Pleas (to the whole action), first, not guilty; secondly, that the *locus in quo* was the soil and freehold of the defendant Proudlock, wherefore he, in his own right, and Stoker as his servant, &c.; thirdly, a similar justification under a right of way in the defendant Proudlock, in respect of a close in his occupation; fourthly, that the *locus in quo* was a public highway. The replication joined issue on the first plea, and traversed the matter of the three other pleas, on which traverses the defendants joined issue. On the trial before Taunton, J., at the York Spring Assizes, 1834, the cause was referred to a barrister, with power to order a verdict for the plaintiff, or a nonsuit, or a verdict for the defendant; but the fourth plea was withdrawn by consent. The arbitrator was to have power to direct what should be done by either party, and what road the defendant Proudlock should have. The costs of the cause, and of the reference, were to be in the discretion of the arbitrator, who was also to hear, and decide on the costs of the cause, as if the fourth plea remained. The costs awarded by the arbitrator were to be taxed by the proper officer, and to be recovered, if necessary, as if they were costs in the cause. The arbitrator awarded *that a verdict should be entered for the defendants on the third issue; and

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for the plaintiff on the first and second issues, with 1s. damages on each ; and that the plaintiff should pay the defendants their costs in the cause, and the costs of the reference and award, to be taxed by the proper officer ; such payment to be made on the expiration of fourteen days from the taxation thereof. The award then directed that Proudlock should have a road, described in the award, in respect of his close named on the third plea.

ALLENBY
v.
PROUDLOCK.

The *postea* was drawn up for the plaintiff on the first two issues, with 1s. damages on each, and for the defendants on the third issue ; the fourth issue was not noticed.

The defendants, on going before the Master to tax their costs, contended that the award entitled them to the costs of all the issues as costs in the cause, notwithstanding the finding for the plaintiff on the first and second issues. But the Master was of opinion that they should be apportioned, according to [Rules of Court.] For the purpose, however, of his receiving the direction of the Court, *Alexander* obtained a rule in this Term (November 3rd) calling upon the plaintiff to shew cause why the *postea* should not be amended pursuant to the award, or why it should not be referred to the Master to tax the defendants their general costs under the award.

[The rule having been argued:]

LORD DENMAN, Ch. J. :

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The fourth issue was withdrawn from the consideration of the arbitrator, except that he was to determine the costs as if it had remained. He cannot be supposed to have considered the costs on this issue, which was taken out of the cause, as costs in the cause (1) ; and, had he meant to give them to either party, he would have said so. Each party is therefore *left to pay his own costs of this issue. Then, as to the costs of the cause, we think that the Master should allow them to the plaintiff on the two issues found for him ; and to the defendants on the third ; for in our opinion the arbitrator's meaning was, that the defendants should have the costs in the same way as they

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(1) See *Vallance v. Evans*, 1 Cr. & M. 856 ; 3 Tyr. 865.

ALLENBY would have had them if the issues had been similarly found
r.
 PROUDLOCK. on a trial.

PATTERSON, J. :

The arbitrator had absolute power. If he meant the plaintiff or defendants to have the costs of the fourth issue, he should have said so. I think, therefore, that, as to this issue, we must leave each party to bear his own costs. As to the issues found against the defendants, he meant the plaintiff to have the costs of them; for he leaves the defendants to their costs in the cause.

WILLIAMS and COLERIDGE, JJ. concurred.

Referred to the Master to tax the plaintiff his costs of the first and second issues; and to tax the defendants their costs of the third issue; and ordered that the Master disallow to either party the costs of the fourth issue: and, further, that no costs be allowed to either party of this application.

1835.
 Nov. 23.

MOSCATI v. LAWSON.

(4 Adol. & Ellis, 331—332.)

[331]

On a trial in the Exchequer, a juror was withdrawn by consent. Afterwards plaintiff sued defendant in this Court for the same cause of action. This Court stayed the proceedings as being contrary to good faith: although the plaintiff, who had conducted the first cause for himself, and was not a lawyer, deposed that he did not know that the arrangement would debar him from bringing a second action.

THE plaintiff declared against the defendant, in the Court of Exchequer, for publishing a libel concerning him, to which the defendant pleaded a justification. The cause was tried in February last, at Westminster, before Alderson, B. The plaintiff, who was not a lawyer, conducted his own cause. The publication was proved; and the defendant called evidence in support of his plea. The plaintiff then commenced his reply, in the course of which the learned Judge suggested that a juror should

be withdrawn, to which both parties agreed. Nothing was said as to another trial, or a fresh action. Subsequently the plaintiff commenced, in this Court, a fresh action against the defendant, for the same publication. In this Term, *Sir John Campbell*, Attorney-General, obtained a rule calling on the plaintiff to shew cause why the proceedings should not be staid, on the ground that the action was brought contrary to good faith. In opposition to the rule, the plaintiff made affidavit that, when he consented to withdraw a juror, he did not understand that the arrangement would debar him from bringing a fresh action.

MOSCATI
v.
LAWSON.

Sir F. Pollock and *Petersdorff* now shewed cause against the rule, which was supported by *Sir John Campbell*, Attorney-General, and *Platt*.

LORD DENMAN, Ch. J. :

This rule must be made absolute. A party who consents to such an arrangement is *bound by it: he should take care to have the effect of it explained to him before he enters into it.

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PATTESON, WILLIAMS, and COLERIDGE, JJ. concurred.

Rule absolute.

BIDDLECOMBE v. BOND.

(4 Adol. & Ellis, 332—338; S. C. 5 N. & M. 621; 5 L. J. (N. S.) K. B. 47.)

1835.
Nov. 23.

[332]

Defendant gave a warrant of attorney to plaintiff to secure the payment of a debt by instalments. Shortly before the first instalment was due, defendant told plaintiff that he feared he could not meet it, and that, unless time was given him, he would make over his effects for the benefit of his creditors. An agreement was then entered into between plaintiff and defendant, that defendant should give his acceptance for a part, and pay the rest by instalments according to his ability, so as to discharge all before April 1st, 1836; and that plaintiff should not enter up judgment unless defendant should dispose of his business or become bankrupt or insolvent.

Defendant paid the acceptance when due. Afterwards, and before April 1st, 1836, defendant asked plaintiff to make him a bankrupt, in order to relieve him from his difficulties, and said that he could not pay 20s. in the pound, and that his assets were 200*l.*, and his debts 300*l.*

Held, that plaintiff might enter up the judgment and take out

BIDDLE-
COMBE
v.
BOND.

execution, defendant appearing to be insolvent in the sense contemplated in the agreement: and that the facts above stated did not shew that plaintiff, at the time of the agreement, knew defendant to be insolvent in that sense.

The expression "becoming insolvent" means a general inability to pay debts, and does not signify taking the benefit of the Insolvent Debtors' Act, unless the context so restrains it.

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THE defendant gave the plaintiff a warrant of attorney to confess judgment, with a defeazance, stipulating for the payment of 170*l.* by three equal instalments on certain days. Shortly before the first instalment became due, the defendant informed the plaintiff that he feared he should not be able to meet it, and that, unless the plaintiff gave him farther time, he would make over his effects for the general benefit of his creditors. It was then agreed that the defendant should give the plaintiff his acceptance for 30*l.* at three months, which was done, and a written agreement was signed by the two parties, whereby, after reciting the giving of the warrant of attorney to secure *170*l.*, it was agreed that, in consideration of 30*l.* to be paid by the defendant to the plaintiff in pursuance of his acceptance, and of his agreeing to pay the further sum of 26*l.* on or before the 29th of September then next, and the remainder of the debt by instalments of various small sums according to his ability, so that the whole should be discharged on or before April 1st, 1836, the plaintiff should not enter up judgment on his warrant of attorney, unless the defendant should in the mean time have disposed of his business, or unless he should "have become bankrupt or insolvent;" but otherwise it should remain in full force. This agreement was executed March 30th, 1835. The defendant paid the 30*l.* on his acceptance.

About the end of June, 1835, the defendant requested the plaintiff to make him a bankrupt, in order to relieve him from his difficulties; and, a few days after, the defendant, being asked by the plaintiff how much in the pound he could pay if he compounded with his creditors, said that 20*s.* in the pound was out of the question; that his stock and book debts amounted to about 200*l.*, and that he owed full 300*l.*; and he then again urged the plaintiff to make him a bankrupt. On the 7th of July, the plaintiff caused judgment to be entered up; and

a writ of *fiery facias* issued on the same day, under which the sheriff made a levy on the 8th of July.

The defendant then applied to WILLIAMS, J., at Chambers, to have the judgment and execution set aside for irregularity, upon his affidavit, in which, after setting forth the warrant of attorney and the agreement, he deposed that he had paid his acceptance at maturity, that he had not, since the date of the agreement, disposed of his business, become bankrupt, applied for or obtained *the benefit of any Act for the relief of insolvent debtors, or made a declaration of insolvency in the London Gazette; that he had not made any composition with his creditors, or assignment for their benefit of his goods and effects, nor, to the best of his knowledge, done any other thing whatsoever that would denote or imply that he had not the means of paying and discharging his just debts; and that, according to the best of his knowledge and belief, his pecuniary circumstances and credit were at the time of the issuing of the writ in a better state than at the date of the agreement. In answer, the plaintiff made affidavit of the facts before mentioned. The learned Judge ordered the judgment and execution to be set aside for irregularity. In this Term, *Erle* obtained a rule to shew cause why the order should not be set aside.

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COMBE
v.
BOND.

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Hodges now shewed cause on affidavits setting out the facts before stated. * * *

Erle, contra. * * *

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LORD DENMAN, Ch. J. :

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It is contended that the word "insolvent," as used in the agreement, must be restrained to such an insolvency as would be shewn by the party taking the benefit of the Act for the Relief of Insolvent Debtors, inasmuch as the word occurs in company with "bankrupt." We cannot so restrain it. But then it is contended that the plaintiff, at the time of the agreement, knew that the defendant was in insolvent circumstances, in the wider sense. We think that does not appear: it does not follow, from any thing which took place, that the plaintiff believed that the defendant would be ultimately unable to

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COMBE
r.
BOND.

satisfy the demands against him: and such a belief would, indeed, be inconsistent with the plaintiff's conduct. The agreement has therefore not been violated, and the rule must be made absolute.

PATTERSON, J.:

I am of the same opinion. It would require a very strong case to shew that the meaning of the word was restrained to taking the benefit of the Act. If the context does not shew something to induce us to put such an interpretation on the word, we must hold it to be intended of a general inability to pay debts.

WILLIAMS, J. concurred.

[338] COLERIDGE, J.:

I am of the same opinion. The burthen of proof is on the defendant, who owes money for which he has given a warrant of attorney, and seeks to preclude the plaintiff from the ordinary remedy. If he can oust the plaintiff from that remedy, he must do it by shewing that the proceeding is contrary to good faith. The word "insolvent" may have the general meaning which the plaintiff seeks to give it: the defendant is to shew that it cannot have that meaning, which he has not done.

Rule absolute.

1835.
Nov. 24.

LANCASTER v. HEMINGTON.

(4 Adol. & Ellis, 345—347; S. C. 5 N. & M. 538.)

[345]

An action on the case against an attorney, for negligently preparing a conveyance of land to the plaintiff, was referred to an arbitrator with all matters in difference. The plaintiff's case on the reference was, that many words in the deed were written on erasures, which were not noticed in the attestation; that the deed was in other respects incorrect and improperly prepared; and that, by reason thereof, the plaintiff was prevented from mortgaging. The arbitrator ordered a verdict to be entered for the defendant, and awarded that it was proved before him that the erasures in the conveyance mentioned in the pleadings, were made before the deed was executed. On motion to set aside the award,

on the ground that the facts therein stated did not warrant a finding for the defendant:

LANCASTER
v.
HEMINGTON.

Held, that the above statement of fact by the arbitrator did not shew that his decision proceeded on that fact; and, therefore, that no ground appeared for reviewing his award.

THIS was an action on the case against the defendant for not having, as an attorney employed by the plaintiff, used due or proper skill and care in preparing a conveyance, from one Tranter to the plaintiff, of certain lands in the pleadings mentioned. At the Warwick Assizes a verdict was taken for the plaintiff, subject to a reference as to the verdict and all matters in difference.

The arbitrator made his award of and concerning the matters referred, as follows. "I do order and direct that the verdict and damages entered for the plaintiff in the said action be set aside, and that the verdict in the said action shall be finally entered for the defendant; and I do adjudge, award, and declare, that it was proved before me, that all the erasures and interlineations appearing in the said conveyance in the pleadings in the said action mentioned, and which bears date on the 5th day of April, 1826, were made before the said conveyance was executed by any of the parties thereto, and before livery of seisin of the land thereby conveyed was made." (Then followed a direction as to the costs of the reference, which were in the arbitrator's discretion.) "And I do declare that no other matter was agitated by the said parties in difference before me, than the matter in difference in the said action. In witness," &c.

A rule *nisi* was obtained in this Term for setting aside the award, on the ground "that the facts found by the arbitrator in his award are not sufficient to warrant a finding for the defendant; and that it appears from the said award that the arbitrator mistook the question referred to him." In support of this rule, the attorney who attended the reference for the plaintiff swore that he on that occasion produced the deed of April 5th to the arbitrator, and pointed out to him many words written on erasures (besides interlineations) without any notice in the attestation; that the land, which was conveyed as three pieces, was incorrectly described in the *habendum* and indorsement of livery of seisin as one plot only; that, independently of the interlineations and erasures, the deed was not a proper conveyance

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and that, by reason of its being improperly prepared, the plaintiff, before he could effect a mortgage, was obliged to procure another conveyance from Tranter. The affidavit further set out some alleged circumstances of suspicion, with respect to the execution of the deed: and it stated that the plaintiff's case before the arbitrator rested, not merely upon the erasures having been made at any particular time, but upon the deed being so negligently and unskilfully prepared, and of such a suspicious appearance, that no one could be advised to act upon it.

Goulburn, Serjt., now shewed cause :

The arbitrator has, in general terms, awarded a verdict to be entered for the defendant. The award does not shew that the only fact considered by the arbitrator was that of the erasures being made before or after execution of the deed; and to go into any of the other facts would be *reviewing the case upon the merits. The Court then called upon

Waddington, contrà :

The whole context of the award shews that the fact found by the arbitrator was the ground of his decision. He was not called upon to state any fact. The award, in speaking of erasures in the conveyance, refers to the pleadings; the Court, therefore, will look at the pleadings, and see how the fact found bears upon the question raised by them.

LORD DENMAN, Ch. J. :

I think not. Supposing that the arbitrator has mistaken the law, he has stated nothing on his award which shews him to have done so. Some of the parties may have wished, for the sake of character, that he should give his opinion as to the erasures. He was not bound to state any thing on that subject; but I think we are not called upon to say that his finding of a particular fact shews that he made it the ground of his decision. Then, if there has been any mistake, it is one which we cannot arrive at without going into the merits. The rule must be discharged.

WILLIAMS and COLERIDGE, JJ. concurred.

Rule discharged.

PAYNE AND ANOTHER *v.* CHAPMAN.

(4 Adol. & Ellis, 364—365.)

1835.
Nov. 25.

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A certificated bankrupt, being arrested on a *ca. sa.* for a debt proveable under the commission, paid the money under a protest, stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money paid back :

Held, that this was not such a payment of money under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money.

THE defendant, a certificated bankrupt, was arrested on a *ca. sa.* at the suit of the plaintiffs, for a debt of 18*l.* proveable under the commission. To obtain his liberty, he paid the debt and costs into the hands of the officer, but delivered to him at the same time a written notice to the sheriff, stating that he was not liable to the arrest, by reason of the bankruptcy and certificate ; that he protested against such arrest ; that he had claimed his discharge, which being refused, he, with that notice, deposited the sum claimed for debt, costs, &c., protesting against the right to demand them ; and that he warned the sheriff not to pay over any of the money, it being his intention to dispute the claim to it, and to apply to the Court or a Judge that it might be returned. The sheriff kept the money in his hands. A rule was obtained in this Term, calling on the sheriff and the plaintiffs to shew cause why the 18*l.* should not be paid over to the defendant. By the affidavits in answer, it appeared that the writ had been issued before the certificate was allowed : that the defendant kept himself secreted until he had obtained the certificate ; and that, three days afterwards, he put himself in the way of the officer, for the purpose, as was alleged, of being arrested, and of subjecting the plaintiffs to costs. Upon the arrest he produced his certificate, and claimed to be discharged.

Crowder, for the plaintiffs, and J. Henderson for the sheriff, now shewed cause, and contended that the defendant *ought to have applied for his discharge under stat. 6 Geo. IV. c. 16, s. 126 ; and that, not having done so, and having paid the money under legal process, with full knowledge of the facts, he could not now recover it back, as to which point they relied on *Hamlet v. Richardson* (1).

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(1) 35 R. R. 653 (9 Bing. 644).

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Per CURIAM (1), (stopping *Sir W. W. Follett*) :

This is not the case of a party, with knowledge of the facts, paying money under legal process, as in *Hamlet v. Richardson* (2), for the defendant here paid it under a protest, by which he said, in effect, that, if the sheriff was not entitled to take it, it must be paid back.

Rule absolute.

1836.

TICKLE v. BROWN (3).

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(4 Adol. & Ellis, 369—384; S. C. 6 N. & M. 230; 1 H. & W. 769; 5 L. J. (N. S.) K. B. 119.)

The words “enjoyed by any person claiming right,” applied to easements, in stat. 2 & 3 Will. IV. c. 71, s. 2, and “enjoyment thereof as of right,” in s. 5, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion, or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse a trespass.

To a plea of forty or twenty years’ enjoyment of a way, a licence, if it cover the whole time, must be pleaded.

But a parol or other licence, given and acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right: and this, whether the licence be granted for a single time of using, or for a definite period.

Seemle, that, where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to shew that such non-user was not a voluntary forbearance, give evidence that, two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it.

TRESPASS. The first count was for assaulting and beating the plaintiff’s servant; the second count was for assaulting, beating, and imprisoning the servant; *the third count was for beating, illtreating, keeping, and detaining the plaintiff’s

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(1) Lord Denman, Ch. J., Patte-
son, Williams, and Coleridge, JJ.

(2) 35 R. K. 653 (9 Bing. 644).

(3) This case has been frequently
cited in subsequent judgments, of

which the judgment of the Court of
Appeal in *Hollins v. Verney* (1884)
13 Q. B. D. 304, 307, 53 L. J. Q. B.
430, 432, may serve as an example.
—R. C.

horse; the fourth count was for taking and carrying away goods and chattels of the plaintiff, and converting and disposing thereof to the defendant's use.

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First plea, Not guilty.

Second plea, to the first, second, and third counts, and as to taking and carrying away certain of the goods and chattels, that the defendant was possessed of a close, and that the plaintiff and his servant attempted to pass over it with the horse, which was then carrying the goods and chattels, and had driven and ridden him over a part, against the will of the defendant; and the defendant justified the trespasses in defence of the possession of the close. Replication, that long before, and at the times when &c. the plaintiff was, and from thence hitherto has been, and still is, occupier of certain land near the said close; and that the plaintiff, while he was such occupier, and the other occupiers, have respectively, for and during the whole period of forty years next before the commencement of this suit, used and actually enjoyed, as of right and without interruption, a certain way, unto, into, through, and over the defendant's close (which way was described in the replication); and the said plaintiff having occasion &c. (justifying the act of the plaintiff and his servant, mentioned in the second plea, in virtue of the right of way); and thereupon the defendant of his own wrong &c. Rejoinder, that the plaintiff and divers of the others occupiers of the lands, whilst they were occupiers, and during the said period of forty years, to wit, on the 1st of January, 1797, and on divers *other days and times between that day and the commencement of this suit, were interrupted in the use and enjoyment as of right of the way in the replication mentioned, and the parties so interrupted submitted to and acquiesced in the interruptions for the space of one year and more after they had notice thereof, and of the persons making the same, and while the parties so interrupted were occupiers, &c. Verification. The surrejoinder traversed the interruption and acquiescence in manner and form, &c. *Similiter*.

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Third plea, to the third count, that the plaintiff and his servant were attempting to drive and ride the horse over a part of the defendant's close, &c.; and the plea justified the trespass

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in defence of the possession of the close. Replication, as the replication to the second plea, *mutatis mutandis*. Rejoinder, that the plaintiff and his servant were attempting to drive and ride the horse over a certain part of the close in a north-easterly line and direction from &c. (describing the direction), which are the same trespasses committed by the plaintiff and his servant, mentioned in the second plea; and, further, that the plaintiff and the other occupiers of the said lands have not respectively, for and during the full period of forty years next before the commencement of this suit, used and actually enjoyed, as of right, any such way &c. in the line and direction hereinbefore mentioned. Verification. Surrejoinder, that the plaintiff and other occupiers have, for and during the full period &c., used, &c., the said way, &c., over the said close in the line and direction mentioned in the rejoinder. *Similiter*.

On the trial before Lord Denman, Ch. J., at the Devonshire Summer Assizes, 1834, the trespasses were proved, and *prima facie* evidence of the enjoyment of the way for *forty years was also given. The defendant proved that, about the year 1800, the close was ploughed up for tillage, and that, while it was under tillage, which was for three or four years, the way had not been used; and the plaintiff's counsel having suggested that this was merely an abstinence, by the parties entitled to use it, for the convenience of the owner of the close, the defendant proposed to ask a witness whether 1*l.* a year had not been paid, in 1798, by the occupiers of the land in right of which the way was claimed, for the use of the way. The plaintiff's counsel objected that this evidence could not be given, under stat. 2 & 3 Will. IV. c. 71, s. 5. The LORD CHIEF JUSTICE rejected the *evidence. Evidence was also offered of declarations made by occupiers of the same land, antecedently to the close being under tillage, that they were not entitled to use the way except by permission of the owners of the close. This was objected to, and excluded. Verdict for the plaintiff on all the issues. In Michaelmas Term, 1834, *Coleridge*, Serjt. obtained a rule to shew cause why a new trial should not be had, on the ground of the rejection of evidence of the payment, and also of the rejection of evidence as to the declarations, so far only as the admissibility of such evidence

could be shewn by virtue of the statute: but the rule was refused, so far as it was applied for on the ground that the declarations of the occupiers, unaccompanied by any act, were evidence independently of the statute.

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In Michaelmas Term last, on the 18th and 19th of November (1),

[After argument, the Court took time for consideration.]

LORD DENMAN, Ch. J., in this Term, February 1st, delivered the judgment of the Court. After having stated the pleadings, his Lordship proceeded:

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At the trial, it was proposed, on the part of the defendant, to shew that a parol agreement had been made, and consideration paid for passing, in the year 1798. This evidence was offered on the first issue (2), to negative the enjoyment for forty years as of right. And it was also offered on the second issue (3), as of itself *shewing an interruption acquiesced in, or at all events as explanatory of the character of a cessation to use the way for four years, commencing in 1800, which cessation was proved, and ascribed by the defendant to interruption, but by the plaintiff to a voluntary abstinence from user, on account of the close being in tillage. The evidence was rejected, and the plaintiff had a verdict. A rule *nisi* for a new trial on the ground of that rejection having been granted, the case was argued in last Michaelmas Term.

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The question turns upon the second and fifth sections of stat. 2 & 3 Will. IV. c. 71, which the Court is called upon to construe, with reference both to the law and the form of pleading; and, in so doing, we have the assistance of the cases of *Bright v. Walker* (4), and *The Monmouthshire Canal Company v. Harford* (5), in which this Act of Parliament came under the consideration of the Court of Exchequer.

The second section of the Act is in the following words (his Lordship here read the second section of the Act), and the

(1) Before Lord Denman, Ch. J., Patteson, and Williams, JJ. Coleridge, J. having been counsel in the cause, took no part.

(2) The issue on the third plea.

(3) The issue on the second plea.

(4) 40 R. R. 536 (1 C. M. & R. 211; 4 Tyr. 502).

(5) 40 R. R. 648 (1 C. M. & R. 614; 5 Tyr. 68).

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fifth section in the following (his Lordship here read the fifth section).

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The greatest difficulty arises from the language of the concluding paragraph of this section, and more particularly from the words "or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment." As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the Legislature as consistent with such an enjoyment; and *as, by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the Legislature used the words "as of right" in such a sense, as that a party confessing the enjoyment "as of right" for forty years or twenty, as the case may be, may account for and avoid the effect of it by alleging in the one case a consent or agreement, provided it be by deed or writing (see sect. 2), and in the other any contract, &c. written or parol (see section 5). It follows that the words "as of right" cannot be confined to an adverse right from all time as far as evidence shews; for, if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it was held by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words "enjoyment as of right" cannot be confined to enjoyment under a strict legal right; for then a "consent or agreement" in "writing," not under seal, of which the second section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words "claiming right thereto" in the second section, otherwise there will be incongruities in the construction of the Act. It seems, therefore, that the "enjoyment as of right" must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use it without danger of being treated as a trespasser, as a matter of

right, whether strictly *legal by prescription and adverse user or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years. According to this view of the Act, a licence in writing must be replied to a plea of forty years' enjoyment, if it cover the whole time, and the same of a parol licence in case of a plea for twenty years.

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But it was argued by the *Attorney-General*, that each leave given, in case of permission repeatedly asked, is as much a consent or agreement *pro hac vice* as a consent or agreement for twenty years, and therefore, according to this view of the Act, ought to be replied, which is contrary to the decision of *The Monmouthshire Canal Company v. Harford* (1). On looking at the report of that case, we find that the decision rests on this ground, viz., that the asking leave from time to time within the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking within the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow that, not only an asking leave, but an agreement commencing within the period, may be given in evidence under the general traverse, notwithstanding the words of the fifth section; for the party cannot and does not *rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as shewing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years.

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The evidence proposed ought therefore to have been received on the first issue; and, on the second, it may also have been

(1) 40 R. R. 648 (1 C. M. & R. 614; 5 Tyr. 68).

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admissible, to shew that the cessation to use was by reason of want of right, and not from voluntary abstinence.

The rule for a new trial must therefore be made absolute.

Rule absolute.

1836.
Jan. 12.
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REX v. GEORGE HENRY WARD, ESQUIRE (1).

(4 Adol. & Ellis, 384—409; S. C. 6 N. & M. 38; 1 H. & W. 703; 5 L. J. (N. S.) K. B. 221.)

On the trial of an indictment for a nuisance in a navigable river and common King's highway, called the harbour of C., by erecting an embankment in the waterway, a finding by the jury that the embankment was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, amounts to a verdict of Guilty.

It is no defence to such an indictment, that, although the work be in some degree a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port.

INDICTMENT, stating that the Medina river was an ancient navigable river and common King's highway for all the liege subjects, &c., with vessels, boats, &c., to pass, repass, and navigate, &c., and that the defendant, in a certain part thereof called Cowes harbour, upon the soil and in the waterway of the said *river and highway, did erect and continue a certain building of stones, &c., across the stream and waterway of the said river, by reason whereof the liege subjects, &c., could not pass, repass, and navigate, &c., as they before used, and of right ought, &c. (2). Plea, Not guilty. This indictment was tried before Lord Denman, Ch. J. at the Winchester Summer Assizes, 1834. The principal points of the case, as stated by his Lordship in delivering judgment upon the motion made to set aside the verdict as after mentioned, were as follows :

The subject of indictment was a causeway projecting into the water, and raised on a kind of platform. The causeway

(1) See *Att.-Gen. v. Earl of Lonsdale* (1868) L. R. 7 Eq. 377, 388; *Jolliffe v. Wallasey Local Board* (1873) L. R. 9 C. P. 62, per DENMAN, J., at p. 88; *Att.-Gen. v. Terry*

(1874) L. R. 9 Ch. 423, per JESSEL, M. R., at p. 426, n.—R. C.

(2) See the indictment more fully set out at the end of this case, p. 373 n., post.

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originally was of gravel, shingle, and stone, called a hard, and went sloping down to the water. The defendant's father had sued out a writ of *ad quod damnum*, under which the proceedings were regularly conducted to their close; then he removed the causeway, and made a new one along the water's edge, considerably to the south. In the year 1833, this new causeway was considerably lengthened in the same direction, which was inwards up the harbour. It was also then first raised on piles, and much heightened, and, instead of sloping down, it is now, at the extremity, five feet four inches higher than the shore.

The indictment was preferred by the corporation of Newport, on the complaint of the harbour master and water bailiff, who are sworn to present nuisances in the harbour. The case which the prosecutors sought to *establish may be taken from the following passage, which I copy from my note of the harbour master's evidence: "The causeway is decidedly an inconvenience to the navigation. Small vessels of twenty-six or twenty-eight tons are much obstructed in their tacking, when making their way up to Newport with the tide. They were in the habit of using a setting-pole, which this prevents, and sends them out into the best (1) of the water." He described also some inconvenience to which square-rigged vessels, lightermen, and row-boats were exposed in consequence of the present state of the causeway, both as to navigation and landing. Many witnesses were called in support of these allegations. On the defendant's part, some witnesses denied the existence of these inconveniences altogether; others represented them as very trifling. But he mainly placed his defence on the advantages obtained by the public from the general result of the alteration, which were thus described by the captain of a steam-boat: "I consider the alteration a great benefit to the public; first, in launching and landing boats more readily; secondly, steam-boats" (and of course other vessels) "can approach where they could not; thirdly, vessels obtain shelter from the quay." And these results were hardly disputed on the part of the prosecution. The

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(1) The witness explained this to mean the deepest.

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learned counsel cited *Rex v. Russell* (1), and Hale, *De Portibus Maris*, p. 85 (2).

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In summing up the evidence after a long trial, I asked the jury to state their opinion whether the causeway in its altered state was a nuisance to the navigation of the *river; and whether the public benefit was greater than the inconvenience. The jury, after deliberation, stated that an impediment had been created; but I declined to receive that expression, as not necessarily equivalent to the word "nuisance," which might be too trifling in degree to be properly so called. They said at length that they considered it to be a nuisance; but they added, both at first and at last, that the inconvenience was counterbalanced by the public benefit arising from the alteration made by the defendant.

In addition to the facts recapitulated as above by the LORD CHIEF JUSTICE, the following particulars were stated at the trial, some of which were adverted to in argument upon the after-mentioned rule: The causeway built by Mr. Ward, the father, was erected in 1823. The whole was the defendant's private property. It was represented, on behalf of the prosecution, that the causeway extended below low water mark. On the defendant's part, this was denied to be the case, except at particular tides. The way from the present causeway into the town of Cowes was either through the "Fountain" Inn, which was Mr. Ward's property, or under an archway, formed by part of the "Fountain" premises. The latter passage, and the causeway, were open at all times for landing and embarking. It was stated as probable that the number of persons using the causeway for those purposes, in a year, amounted to 50,000. Steam-boat proprietors paid 2*d.* for each passenger landing and embarking, which amounted to 200*l.* a year (3). Other persons landed and embarked without paying. Instances were mentioned, *in which persons going to and from a particular steam-boat had been

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(1) 30 R. R. 432 (6 B. & C. 566). mentioned were required at the wharf only, and that the causeway

(2) Ch. 7, Hargrave's Law Tracts. (as distinguished from the wharf)

(3) It was represented, on behalf of the defendant, that the payments was free.

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forbidden to land where the other steam-boat passengers landed ; but this appeared to have taken place at the wharf, and before the defendant's time. Cattle and goods landed, or going out, were paid for, but not in all instances. There are other places in Cowes, where persons are at liberty to land and embark at all times, but no other where it is always convenient to do so. Some evidence was given (but contradicted by the defendant's witnesses) to shew that the causeway had occasioned accumulations of sand and mud in parts of the harbour. In answer to the evidence adduced to shew that the causeway narrowed the space for tacking, and thereby interfered with the navigation, it was stated that there was a line of moorings farther out in the stream than the end of Mr. Ward's causeway, on the same side, and a similar line on the opposite side ; that pilot and other vessels constantly lay at these moorings ; that the space between them and the shore was usually occupied by small boats ; and that the regular course for vessels going up the Medina was between the two lines of moorings. But it was also stated that vessels tacking often kept their course as far as the depth of water would allow ; that, at the place in question, the harbour was very narrow, and the tide strong, and that it was often important for vessels working in or out to have an opportunity of making as long tacks as possible. *Follett*, in addressing the jury for the defendant, insisted, not only upon the usefulness of the work in question to the harbour, but also upon the benefit conferred by it on the Isle of Wight generally, in favouring the resort of visitors.

On the above finding of the jury, *Follett*, in the *ensuing Term, obtained a rule to shew cause why a verdict of Not guilty should not be entered, on the ground that the finding amounted to an acquittal.

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[In the arguments, the case of *Rex v. Russell* (reported from 6 B. & C. 566, in 30 R. R. 432, and see note there) was much discussed. After consideration :]

LORD DENMAN, Ch. J. delivered the judgment of the Court :

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After stating the nature of the indictment, and the principal facts of the case, the questions left to the jury, and the

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verdict, (for which see page 366, *ante*,) his Lordship proceeded as follows :

Sir William Follett obtained a rule of this Court for entering a verdict of Not guilty, on the ground that the finding amounts to an acquittal. And this conclusion would probably be found irresistible, if the case of *Rex v. Russell* (1) was well decided by the majority of this Court, or rather if the direction of the learned Judge who tried that indictment, correctly laid down the law.

That learned Judge concluded his address to the jury in these terms :

"If you think this is placed not in a reasonable part of the river, that it does an unnecessary damage to the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience which arises from it, then you will find your verdict for the Crown. If on these points you are of a different opinion, then for the defendants." In substance, therefore, it should seem that the jury were directed to find the defendant Not guilty, if his act, indicted *as a nuisance, were productive of more public benefit than public inconvenience.

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The greatest weight is due to the authority of Mr. Justice BAYLEY, who thus charged the jury, and afterwards upheld his opinion in this Court; and no person can hesitate to ascribe every quality of an excellent Judge to Mr. Justice HOLROYD, who agreed with him in thinking that the rule for a new trial for misdirection ought to be discharged. But, when we examine the grounds of this opinion, as delivered by the latter, they will not be found to support in any degree the proposition just noticed in the summing up; on the contrary, he plainly considers the topic to have been introduced as an answer to some observations invidiously made to the defendant's prejudice, by the counsel who conducted the prosecution, and thinks that it must be qualified throughout the summing up, and even to its close, by its connection with that argument. Mr. Justice BAYLEY himself, who delivered his judgment after Mr. Justice HOLROYD, takes a much wider range, maintaining the right to estimate the

(1) 30 R. R. 432 (6 B. & C. 566).

balance of public benefit and public inconvenience, and to take into the account of the former the advantages that may be derived from the change by any part of the public. He takes for an example the purchasers of coals, sent from the indicted staith to a distant market. Lord TENTERDEN thought it wrong to submit such extensive views to the jury, and that the question ought simply to have been, "whether the navigation and passage of vessels over this public navigable river was injured by those erections."

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Lord TENTERDEN's dissent must be allowed to detract greatly from the authority to be ascribed to the direction given at *Nisi Prius*, which his Lordship was evidently *anxious to sustain if possible: and, when it appears that HOLROYD, J. founds his support of the direction on a distinction which excludes the general principle now contended for and avowed by BAYLEY, J., the case of *Rex v. Russell* (1) will appear to rest on the single authority of that learned Judge, acting at *Nisi Prius*, and satisfied on reflection with the course which he had then taken. It is observable also that of the distinguished counsel who opposed the rule for a new trial in *Rex v. Russell* (1) and who have addressed us on the present occasion, none have maintained that the direction there given was altogether conformable to law.

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If indeed it were, we may well feel some surprise that the doctrine appears there for the first time; certainly no trace of it has been discovered in any law book of an early date, but the cases quoted from Cro. Car. (2) and Salkeld (3) display a strong repugnance to it. The first glimpse of it is detected in some expressions employed by Lord TENTERDEN, in *Rex v. Earl Grosvenor* (4). His Lordship there lays it down, that "the public have a right to all the convenience which the former state of the river afforded, unless by the change some greater degree of convenience is rendered." Vessels are entitled, he says, to the advantage of shelter, "unless the want of it be compensated by some superior advantage resulting from the alteration." Hence it is inferred that, if the public had derived any new convenience from the change, which a jury should think greater

(1) 30 R. B. 432 (6 B. & C. 566).

(3) *Payne v. Partridge*, 1 Salk. 12.

(2) *Rex v. Ward*, Cro. Car. 266.

(4) 20 R. B. 732 (2 Stark. 511).

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than that which the nuisance took from them, or if some advantage superior to that of shelter had resulted from the destruction of that shelter, his Lordship would have directed an acquittal. But this by no means follows; for all who have studied the course *adopted by that learned and cautious Judge are well aware that his habit never was to lay down a larger proposition of law than the case in hand required. It is evident that, in *Lord Grosvenor's* case, which was that of an embankment raised by an individual for his own profit, the only question which he thought necessary to be submitted to the jury,—viz., whether the public had benefited by the alteration made,—was plainly confined to such benefits as the public might have derived from it, in the exercise of that very right, the invasion of which was treated as a nuisance. If he had contemplated the doctrine of *Rex v. Russell* (1), he would have told the jury to consider whether that part of the public which consisted of the frequenters of the wharf had not gained more than the navigating part of the public had lost, by means of the erection made. But even if the language employed had comprehended in its terms all possible modes of compensation, Lord TENTERDEN's judgment in *Rex v. Russell* (1) plainly shews what his deliberate view of the law was, and that the advantage gained ought to be closely connected with the inconvenience resulting; or rather with that which would have been an inconvenience if it were not absorbed in the superior advantage. This is most apparent, from what is ascribed to him in p. 602.

In this view of the law my brother LITLEDALE authorises me to say that he fully agrees, though his connection, when at the Bar, with the case of *Rex v. Russell* (1) induced him to take no part in that decision.

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And in the infinite variety of active operation always going forward in this industrious community, no greater evil can be conceived than the encouragement of capitalists *and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by ultimately being thought to supply the public with something better than what they actually enjoy.

(1) 30 R. B. 432 (6 B. & C. 566).

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There is no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvement soon leads to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public which may suffer for their advantage.

In the recent argument, the doctrine of compensation for nuisance was supported by one analogy only. Mr. Bere, comparing the right of navigation over a waterway to that of walking along the street, observed that the latter was sometimes interrupted by the exercise of other rights, as when a hoard is erected for repairing a house. But it rather appears that the hoard is placed for the safety of those possessing the right of way; it protects them from inevitable danger if it leaves them a free passage, and sends them another way if the whole street is necessarily obstructed. Every way to which houses adjoin must be considered as set out subject to these occasional interruptions, which resemble the temporary acts of loading coals in keels, alluded to in *Rex v. Russell* (1). A permanent hoard would be abatable as a nuisance; and it much resembles the staith in *Rex v. Russell* (1), the wharf in *Lord Grosvenor's* case (2), and the quay, for which this indictment was preferred.

But the learned counsel contended that they did not *want the authority of *Rex v. Russell* (1), and could establish their right to a verdict of Not guilty, on the finding of the jury, from a consideration of the nature of the place where the nuisance is charged. They say that the river Medina, as described in the indictment, is not merely a navigable river, but a port, Cowes Harbour, and they rely on the various rights that may exist together in such a place, and their unavoidable inconsistency, at particular times. The same remark may, however, be true, with respect to a highway, where right of common of pasture, and right of common of turbary, may exist at the same time. It is still more strikingly true in respect of navigable rivers, from which it seems impossible to distinguish the case of ports, in principle, though the degree may perhaps be different.

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(1) 30 R. R. 432 (6 B. & C. (2) 20 R. R. 732 (2 Stark. 511).
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Where such rights happen to clash in questions brought before the Court, the valuable maxim *sic utere tuo ut alienum non lædas* will generally serve as a clue to the labyrinth.

But the possible jarring of pre-existing rights can furnish no warrant for an innovation which seeks to create a new right, to the prejudice of an old one. There is no legal principle to justify this proceeding, unless *Rex v. Russell* (1) is well decided.

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Recourse is then had to the great and venerable name of Hale, from whose excellent treatise *De Portibus Maris*, p. 85, some such words as the following may be extracted. It is not every building below the high water mark, that is, *ipso facto*, in law a nuisance, for that would destroy all the quays that are in all the ports of England. For they are built below the high water *mark, for otherwise vessels could not come at them to unload, and some are built below the low water. And it would be impossible for the King to licence the building of a new wharf or quay, whereof there are a thousand instances, if, *ipso facto*, it were a common nuisance. Nay, in many cases it is an advantage to a port to keep in the sea water from diffusing at large; and the waters may flow in shallows where it is impossible for vessels to ride.

But Hale, in this passage, is only disputing the doctrine “that every building below the low water mark is, *ipso facto*, in law, a nuisance;” which his observation on existing quays, and on such as may have been created under the King’s licence, effectually disproves; and the argument is strengthened by the fact that, in some cases, such buildings are essential to the harbour being navigated at all. Here is no question of balancing nuisances; nor was the position intended to affect the general rule laid down by the same great authority at page 9 of the same treatise, that “all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments.” There is no incongruity in his afterwards asserting that the question of nuisance or no nuisance is for the jury; so Lord TENTERDEN considered it in *Rex v. Russell* (1), and gave the form in which he thought it

(1) 30 R. R. 432 (6 B. & C. 566).

ought to be submitted to them; and that is precisely the course taken on the trial of this indictment.

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The jury, having answered my inquiry in the affirmative, have plainly found a verdict for the Crown, unless their added statement entitled the defendant to *an acquittal. For the reasons given, we think it did not, and that the present rule must, therefore, be discharged.

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Rule discharged (1).

(1) The indictment in the present case was as follows:

1st count. That the river Medina, otherwise called Newport river, is, and from time whereof &c. was, an ancient navigable river and common King's highway for all the liege subjects of our lord the King with their vessels, boats, lighters, barges, and craft, to pass, repass, and navigate at their free will and pleasure, to wit, at the borough of Newport, in the Isle of Wight, in the county of Southampton; and that George Henry Ward, late of &c., Esquire, on the 1st day of July in the fourth year &c., 1833, with force &c., at the borough aforesaid, in a certain part of the said navigable river and common King's highway, called Cowes Harbour, in and upon the bed and soil of the same, and in the stream and waterway thereof, unlawfully, wilfully, knowingly, and injuriously, did erect, raise, and place, and cause to be erected and placed, a certain building composed of stones, timber, and other materials, of great length and width, viz. of the length &c., and of the width &c., projecting into and across the stream and waterway of the said navigable river and King's highway: and the said building, so as aforesaid erected, raised, and placed in the said river and common King's highway there, from the said 1st of July until the day of taking this inquisition, at &c. aforesaid, the said G. H. W. then and there unlawfully, &c., did continue,

and still doth continue. By reason whereof the liege subjects &c., during all the time aforesaid, could not, nor can they now, pass and repass and navigate with their vessels, boats, lighters, barges, and craft in and along the said river and common King's highway, as freely as they before used and were accustomed to do, and still of right ought to do. To the great damage and common nuisance of all the liege subjects &c. in and along the said river and common King's highway there passing and repassing and navigating with their vessels, &c., as aforesaid; to the evil example &c., and against the peace &c.

2nd count. That G. H. W. afterwards, to wit, on &c., at &c., unlawfully, &c., did raise, erect, and place, and cause to be raised, &c., a certain embankment composed of gravel, earth, &c., and other materials, in and upon the soil and bed of the said river, called the river Medina or Newport river, and common King's highway there, in the stream and waterway of the same, of great length, height, and width, to wit, &c., projecting into, and athwart and across the stream and waterway of the same navigable river and King's common highway; and the said embankment so as aforesaid erected, raised, and placed, from &c. until &c., to wit, at &c., he, the said G. H. W., unlawfully, &c., did continue, and still does continue, to the great damage &c.

3rd count. That G. H. W. after-

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Jan. 14.

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(4 Adol. & Ellis, 420—432; S. C. 6 N. & M. 713; 1 H. & W. 751; 5 L. J. (N. S.) K. B. 134.)

Insurance on a ship, *V.*, with the usual warranty as to average. The ship having come into collision with another ship, and proceedings being instituted for the damage done to the other ship, the matter was referred to arbitrators, who awarded that each ship should bear half of the aggregate loss. The ship *V.* on the settlement had to pay a balance to the other ship: Held, not to be a loss to which the underwriters were liable (2).

Held, also, that the expense of the wages and provisions of the crew of the *V.*, during the time that she was detained in repairing damage done to herself by perils of the sea, were not such a loss.

ASSUMPSIT on a policy of insurance for time on the ship *La Valeur*. The declaration claimed for general average, and

(1) Cited by Lord BLACKBURN in *Inman S.S. Co. v. Bischoff* (H. L. 1883) 7 App. Cas. 670, 686.—R. C.

(2) A consequence of this decision has been the adoption by shipowners of what is called “the running down clause.” See *Xenos v. Wickham* (1867) L. R. 2 H. L. 296,

315; *Stoomvaart, &c. v. P. & O. Steam Navigation Co.* (1882) 7 App. Cas. 795, 52 L. J. P. D. & A. 1; *London Steamship Owners’ Ins. Co. v. Grampian S.S. Co.* (1890) 24 Q. B. Div. 663, 59 L. J. Q. B. 549.—R. C.

wards, to wit, &c., and on divers other days &c., with force &c., at Cowes Harbour, within the borough aforesaid, unlawfully, designedly, and injuriously did place and drive, and cause to be &c., divers, to wit, fifty posts to and into the bed and soil of the said navigable river and common King’s highway, and did cast and throw, and cause to be &c., divers large quantities of stone, gravel, &c., into and upon the bed, stream, course, and waterway of the said river and common King’s highway there, to wit, 200 vessel loads, &c., thereby forming a certain other great mound, slipway, and embankment, projecting and extending into the bed, stream, and waterway of the said river and common King’s highway there, to a great length, height, and width, to wit, the length &c., into the same river and common

King’s highway, to wit, at Cowes Harbour, &c., whereby and by means whereof, the bed, stream, course, and waterway of the said river and common King’s highway there, was during all the time aforesaid, and still is, greatly obstructed, impeded, straitened, and narrowed, and rendered less safe and commodious to the liege subjects &c., in and upon the said river and common King’s highway there passing, repassing and navigating with their vessels, &c., than the same otherwise would have been, and of right ought to have been and to be, to wit, at &c., to the great damage &c.

4th count. That the said G. H. W., to wit, on &c., and on divers other days &c., with force &c., at the borough aforesaid, unlawfully, &c., did cast and throw, and cause and procure to be &c., divers large quan-

for an average loss; the damage was laid to have been occasioned by perils of the sea. The policy contained the usual warranty, free from average under three pounds per cent., unless general, or the ship be stranded. The defendant, as to the claim of particular average, pleaded that the ship did *not sustain an average loss or damage to the amount of 3 per cent., on which plea issue was joined. On the trial before Lord Denman, Ch. J. at the London sittings after last Term, it appeared that the *La Valeur*, being in the Hoogly river, during the time covered by the policy, came into collision with a steam vessel called the *Forbes*, and that considerable damage was done to each vessel. The owner of the *Forbes* claimed a compensation from the *La Valeur*, and threatened to detain her, and to proceed in the Court of Admiralty at Calcutta; and, upon the claim being referred to arbitration, it was awarded that each ship should bear half the joint expenses of the two. Upon the settlement, the *La Valeur* had to pay a balance to the *Forbes*. The *La Valeur* was detained by the necessity of repairing certain damage done to herself by perils of sea; and, during the time of detention, a sum of money was expended in the additional wages of the crew and provisions for them. If either this sum of money or the balance paid to the *Forbes* could be considered a particular average, then there was on the whole an average loss of 3 per cent., but not otherwise. The LORD CHIEF JUSTICE was of opinion that neither of these items could be taken into the

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titles of earth, &c., into the said river and common King's highway there, to wit, 200 cart loads, &c., whereby and by means whereof the said river and common King's highway there was during all the time aforesaid, and still is, greatly obstructed, &c. (conclusion as in the preceding count).

5th count. That the said G. H. W., on &c., and from thence continually until &c., with force &c., at Cowes Harbour within the borough aforesaid, in, upon, and across a certain navigable river and common King's highway, called the Medina river, there situate, divers, to wit, ten other

walls, ten other banks, 100 other posts, 500 pieces of timber, ten other slipways, ten other wharfs, and ten other embankments, before then unlawfully, wrongfully, and injuriously erected, built, and set up, in, upon, and across the said last mentioned navigable river and common King's highway, unlawfully, &c., did keep and continue, and still doth keep and continue, by means whereof the said last mentioned navigable river and common King's highway is greatly obstructed, straitened, and narrowed, to wit, at the borough aforesaid, to the great damage &c.

DE VAUX account of particular average; and a verdict was found for the
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Maule now (1) moved for a rule to shew cause why a verdict should not be entered for the plaintiff for such sum as the Court should direct, or why a new trial should not be had. It is clear that the aggregate *of several partial losses may make up the 3*l.* per cent.; *Blackett v. The Royal Exchange Company* (2). Here the 3*l.* per cent. will be made up if either of two items be allowed. First, the underwriters are liable for the sum paid to the *Forbes*. The words in the policy are, "all other perils, losses, and misfortunes that have or shall come, to the hurt, detriment, or damage of the said goods and merchandizes and ship, &c., or any part thereof." There is, indeed, no English decision precisely on the point; but there seems to be as good reason for underwriters making good such loss as a loss sustained from pirates.

(LITLEDALÉ, J.: That loss is particularized.)

But it would clearly be the subject of indemnity, though not particularized. A general average comes within the insurance only from the general words. The expression "free of average, under three pounds per cent., unless general," shews this; for general average is specified as an exception from the exception: it must therefore be included in the subject-matter from which the main exception is made, that is, in the perils insured against. But among these perils there is no specific mention of general average: the general words therefore cover that, and the same words must also be sufficient to cover any loss by an accident like that in question. The principle is, that the underwriter makes good all that, by means of the peril, the owner is bound to pay: and here he was, in fact, as much bound to pay as the owner of goods is bound to pay harbour duties; for the owners of the *Forbes* had the legal means of enforcing the payment. It is true that, by the English common law, each party bears

(1) Before Lord Denman, Ch. J., (2) 37 R. R. 695 (2 Cr. & J. 244;
 Littledale, Williams, and Coleridge, 2 Tyr. 266).
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*his own costs, in case of a collision, if there be fault in each; and it must certainly be assumed that there was fault on each side, in the present case. But the more generally understood law in maritime states is that, if there be fault in each party, each bears half of the aggregate loss of the two; and this may perhaps be considered the more reasonable principle. In the case of *The Woodrop-Sims* (1) this rule was laid down by Sir WILLIAM SCOTT, as follows: "This is one of those unfortunate cases in which the entire loss of a ship and cargo has been occasioned by two vessels running foul of each other. There are four possibilities under which an accident of this sort may occur. In the first place, it may happen without blame being imputable to either party; as where the loss is occasioned by a storm, or any other *vis major*: In that case, the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise where both parties are to blame; where there has been a want of due diligence or of skill on both sides: In such a case, the rule of law is, that the loss must be apportioned between them, as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down; and in this case the injured party would be entitled to an entire compensation from the other." In the Laws of Oleron (2) *it is said, "If a ship in her voyage, lying any where at anchor, be struck or grappled with another vessel under sail, for want of good steering, whereby the vessel at anchor is prejudiced, and the goods in her damnified; in such a case the whole damage is to be in common, and to be equally divided and appraised half by half. And the master and mariners of the vessel that struck, or grappled with the other, shall swear on the Holy Evangelists, that they did it not wittingly or wilfully; the reason of this judgment is, that an old vessel might not purposely come in the way of a better; which she will hardly do, as long as the damage must be equally shared." In Emerigon, vol. i. p. 418

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(1) 2 Dods. Adm. Rep. 85. (2) 15 Vin. Abr. tit. Master of a Ship (A) 27, p. 340.

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(ed. 1827 (1)), it is said, "Si l'abordage n'est pas arrivé par cas fortuit, et qu'il soit impossible de savoir par la faute de qui, c'est alors le cas de partager le différend, et de faire supporter la moitié du dommage à chacun des deux navires. Tel est le sens de l'art. 10, titre des avaries. 'En cas d'abordage de vaisseaux, est-il dit, le dommage sera payé également par les navires qui l'auront fait et souffert, soit en route, rade, ou au port.'" For which are cited Les Jugemens d'Oléron, art. 14; L'Ordonnance de Wisbuy, art. 26, 27, 50 & 70; and Le Droit Anséatique, tit. 10. The editor, M. Boulay-Paty, in the comparison, at the end of the section, with the modern code of commerce, says (p. 417) that the law is that, if there be doubt, in the case of collision, as to the cause, each vessel is to bear its part; and he goes on thus: "La loi considère donc comme les vraies causes du dommage la fortune de mer, la force majeure qui a poussé les navires l'un sur l'autre; et dans ce cas, la portion qui *incombe au navire assuré doit être à la charge des assureurs, qui, par la nature du contrat d'assurance, sont tenus de tous les accidens arrivés sur mer, quelque insolites, inconnus ou extraordinaires qu'ils soient" (2). That reasoning applies here; and it may be added that, the less an accident can be foreseen, the more properly is it the subject of insurance, since that which was foreseen would not be insurable. Pothier, in his *Traité du Contrat d'Assurance*, ch. i. sect. ii. art. 2, § 2, 49 (3), says, "L'assureur se charge par le contrat d'assurance, des risques de tous les cas fortuits qui peuvent survenir par force majeure durant le voyage, et causer à l'assuré une perte dans les choses assurées, ou par rapport auxdites choses." If, then, the *La Valeur*, as was clearly the case, could not be released without this payment, the payment falls within that class of losses which the underwriters must make good.

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Secondly, as to the wages and provisions of the crew for the time during which the ship was under necessary repair. These are incidental to the repairs, and, being so, must be governed by the same rule. It is a general principle (subject to some

(1) Ch. xii. s. 14.

(3) *Traité sur Différentes Matières*

(2) And see Boulay-Paty, *Cours de Droit Civil*, tom. 3me, p. 18 (2nd ed. 1781).

X. s. 16, tom. 4, p. 16.

exceptions which may easily be explained,) that, where underwriters are liable to indemnify for any part of a loss, they must indemnify for the whole. Now, in the case of any damage which is the subject of general contribution, the wages and other expenses of the crew during the time of repair, which are in the nature of accessaries to the principal expense, that of repairing, must also be the subject *of general contribution. In Abbott on Shipping, Part III. ch. 8, s. 7, p. 350 (5th ed.), it is said, "But if a ship should necessarily go into an intermediate port for the purpose only of repairing such a damage as is in itself a proper object of general contribution, possibly the wages, &c. during the period of such a detention, may also be held to be general average, on the ground that the accessory should follow the nature of its principal." The author does not apply this to insurances, which are not the subject of his work; but the passage seems to warrant such an application of the doctrine, that the accessory is to follow its principal. Now, here, the underwriters were indisputably bound to make good the expense of the repairs: they must, therefore, bear the accessory expense. Suppose, in the case put in the extract just given, the owner of goods, who was liable to the general average, had insured these goods, the underwriters would have to make good the payment of the wages, &c. Why should the same principle not be applied, where the insurance is on the ship, to the share of general average which falls on the owner of the ship? And, if there be no cargo, and consequently no one to contribute to a general average, can that make any difference in the liability of the underwriters? Can it be contended that the principle holds if there be a single bale of goods on board, but ceases to be applicable if there be no cargo? When the damage is to the subject insured, that is a partial loss, to which the underwriter is liable; and it is immaterial to inquire whether it be a general average or not, the underwriter being liable to the assured in the whole (though, if it be a general average, he may claim contribution from those *liable to contribute); so that, in such a case, as between the underwriter and the assured, particular and general average become identical. In *Fletcher v. Poole* (1) it

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(1) 1 Park, Ins. ch. 2, p. 89, 7th ed.

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was held that the extraordinary wages and provisions expended during the detention of the ship could not be recovered on a policy on the ship. But that was a mere case of detention to refit: the plaintiff claimed only the wages and provisions expended during her repairs. It does not appear that the repairs were occasioned by any thing but ordinary wear and tear, or by any thing for which the underwriters were liable. The same remark applies to the cases of *Eden v. Poole* (1) and *Robertson v. Ewer* (2). In *Power v. Whitmore* (3) the wages and provisions of the crew expended while the ship was in port repairing a damage occasioned by a tempest were held not to be the subject of general average; and, consequently, the plaintiff, whose insurance was on goods, could not recover against his underwriter money paid by him as a contribution to such expenses. That decision was on the ground that there had been no sacrifice of a part to preserve the whole, and consequently no general average to which the plaintiff was liable to contribute; reasoning which does not shew that the underwriter on the ship would not be liable to pay the expenses in question, but rather that he would be; for there is no doubt that the principal damage to which the expenses in question were accessary, being a damage to the ship by the perils of the sea, would be one to which he would be liable, though the underwriter on goods (the defendant in **Power v. Whitmore* (3)) would not, according to the doctrine, laid down in *Abbott on Shipping*, Part III. ch. 8, s. 7, p. 350 (5th edit.), that such expenses are not matter of general average, but “must fall on the ship alone.” Whoever is liable to the damage sustained by the ship must therefore sustain such expenses. It follows that the underwriter on the ship, who is clearly liable to the damage which the ship sustains, must pay these expenses also. A stater of averages arranges the losses in three columns, headed respectively, “General,” “Ship,” “Owners;” and under “Ship” he sets down all to which the underwriters on the ship are liable. So BULLER, J., in *Eden v. Poole* (4), held the underwriters on the

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(1) 1 Park, Ins. ch. 2, p. 91,
7th ed.

(2) 1 R. R. 164 (1 T. R. 127).

(3) 16 R. R. 416 (4 M. & S.
141).

(4) Park, Ins. ch. 2, p. 91, 7th ed.

ship and goods not liable, because "the freight, and not the ship," was liable to the loss. In the last cited passage in Abbott, the author refers to the Code de Commerce, art. 403 (1). There the expenses of the wages and provisions of the crew, during the detention by a foreign Power, or by the necessity for repairs, are classed together as particular averages; and the article is cited in the conference of the modern law with Emerigon (vol. i. p. 619, ch. xii. s. 41, ed. 1827), by Boulay-Paty. The same author, in a work of his own, Cours de Droit Commercial Maritime, vol. iv. p. 40, tit. X. *s. 16, says that, in case of the arrest or other detention of a vessel after departure (and in the passage just cited, arrest "par ordre d'une puissance" is placed in the same class with detention for the purposes of repair), the insurers must bear the loss resulting from the cost of provisions and wages of the crew. This is also the American law (2). Some foreign authorities class such expenses as general average, on the same principle as that upon which expenses of going into port to preserve a ship are so classed: this is apparently an extension of the Rhodian law, by which a *jactus* was requisite (3).

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Cur. adv. vult.

LORD DENMAN, Ch. J. in this Term (January 30th) delivered the judgment of the Court:

This was a motion for a new trial in an action of assumpsit, tried before me at Guildhall, on the insurance of a ship, for loss by perils of the sea. The jury found a verdict according to my direction, excluding the expense for wages and provisions incurred

(1) Tit. 11^{ème}, "Sont avaries particulières: 1° le dommage arrivé aux marchandises par leur vice propre, par tempête, prise, naufrage ou échouement; 2° les frais faits pour les sauver; 3° la perte des câbles, ancres, voiles, mâts, cordages, causée par tempête ou autre accident de mer; les dépenses résultant de toutes relâches occasionnées, soit par la perte fortuite de ces objets, soit par le besoin d'avitailllement, soit par voie d'eau à réparer; 4° la nourriture et le loyer des matelots pendant la

détention, quand le navire est arrêté en voyage par ordre d'une puissance, et pendant les réparations qu'on est obligé d'y faire, si le navire est affrété au voyage."

(2) See, however, Phillips's Treatise on the Law of Insurance, vol. i. ch. xvi. sec. 1, p. 370 (Boston, U. S. 1823).

(3) See Pardessus, Cours de Droit Commercial, tom. 2, part iv. tit. iv. ch. iv. sect. i. § v. (740), and part iv. tit. v. ch. i. sect. ii. § i. (773).

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from the time of her repairing damage sustained from a storm, and excluding also the sum of money which the owners had paid in consequence of some proceedings commenced in the Court of Admiralty at Calcutta, in consequence of an accidental collision with another vessel in the Hoogly river. The new trial was moved for on the ground that both these heads of damage ought to have been taken into account by the jury.

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We think it clear, on authority, that the former item ought not to be allowed. As long ago as 1769, in *Fletcher v. Poole* (1), the point was decided by Lord MANSFIELD at Nisi Prius. The doctrine has been cited in the text books ever since that period, and is expressly recognised by BULLER, J. in *Robertson v. Ewer* (2). The facts of that case did not indeed require the doctrine, which is merely assumed in the argument of that learned Judge to illustrate his opinion on the case then before the Court. Mr. Maule therefore urged that the law rested on a single decision of Lord MANSFIELD's at Nisi Prius; but, when we consider the high authority of that great master of insurance law,—that that case was unquestioned,—that it received the sanction of so eminent a lawyer as Mr. Justice BULLER, who treats it as clear enough to lay the foundation of an argument from analogy; when it is fully adopted in the works of distinguished writers on the subject; and, above all, when we find no trace of even a claim being set up inconsistent with it for a period of near 70 years, though the facts must have afforded the opportunity many thousands of times, we think this point must be regarded as fully established, and that we should not be justified in casting any doubt upon it.

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We would only further observe that the passage cited from Lord TENTERDEN's excellent work (3), which speaks of these expenses as being in the nature of an accessory to a principal, is confined to the questions of contribution which may exist between the owners and the freighters, and does not in anywise relate to the demands *which may be preferred against underwriters. It therefore furnishes no proof that he differed from the doctrine above alluded to. On the contrary, if he had intended to

(1) 1 Park, Ins. ch. ii. p. 89,
7th ed.

(2) 1 R. R. 164 (1 T. R. 127).

(3) Abbott on Shipping, 350.

do so, he could hardly have failed to express his dissent in direct terms.

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The second point appears to be entirely new, which circumstance is not so strong an argument against it as against the former claim, because the event is likely to have been of much less frequent occurrence. But, if we look for the principle on which *Fletcher v. Poole* (1) was decided, it must obviously be that well-known maxim of our law, *in jure non remota causa sed proxima spectatur*. "It were infinite" says Bacon (2) "for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any farther degree." Such must be understood to be the mutual intention of the parties to such contracts. Then how stands the fact? The ship insured is driven against another by stress of weather; the injury she thus sustains is admitted to be direct, and the insurers are liable for it. But the collision causes the ship insured to do some damage to the other vessel; and, whenever this effect is produced, both vessels being in fault, a positive rule of the Court of Admiralty requires the damage done to both ships to be added together, and the combined amount to be equally divided between the owners of the two. It turns out that the ship insured has done more damage than she has received, and is obliged to pay the owners of the *other ship to some amount, under the rule of the Court of Admiralty. But this is neither a necessary nor a proximate effect of the perils of the sea; it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice, nor (possibly) quite consistent with it; and can no more be charged on the underwriters than a penalty incurred by contravention of the revenue laws of any particular state, which was rendered inevitable by perils insured against.

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We think therefore that no rule ought to be granted.

Rule refused.

(1) 1 Park, Ins. ch. ii. p. 89,
7th ed.

(2) Maxims of the Law, p. 35 of
Law Tracts, 1737.

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RICKETTS *v.* BODENHAM AND OTHERS (1).SAME *v.* SAME.SAME *v.* SAME.

(4 Adol. & Ellis, 433—447; S. C. 6 N. & M. 170; 1 H. & W. 753; 5 Dowl. P. C. 120; 5 L. J. (N. S.) K. B. 102.)

A writ of prohibition will not be entertained on grounds which might have been brought before the inferior Court; unless the defect appears on the face of the proceedings.

THE defendants, being the churchwardens of the parish of Presteign, in the diocese of Hereford, for the year commencing at Easter, 1830, instituted a suit on the 8th of July, 1830, against the plaintiff, in the Consistory Court of Hereford, for three church rates, amounting severally to 5*l.* 15*s.*, 4*l.* 6*s.* 3*d.*, and 4*l.* 6*s.* 3*d.*, assessed by the churchwardens for the years 1827, 1828, and 1829 respectively. Before they had proceeded beyond the libel, they amended the libel, by abandoning their claim for all but the rate of 4*l.* 6*s.* 3*d.* made by the churchwardens for 1829. A decree was pronounced against the plaintiff, with costs. He then appealed to the Court of Arches, which affirmed the decree, with costs. He then appealed again to the Court of Delegates, which also affirmed the decree, with costs. Three significavits were issued from the several Courts, for the sum of 4*l.* 6*s.* 3*d.* and costs, and three several writs *de contumace capiendo*.

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In Trinity Term last Sir *F. Pollock* obtained three *rules to shew cause why writs of prohibition should not issue to the three Ecclesiastical Courts respectively, on the ground that stat. 53 Geo. III. c. 127, s. 7 (2), took away the jurisdiction of the spiritual Courts in cases where the claim made is for a church rate under 10*l.* The affidavit in support of the rule stated the above facts, and that questions respecting the validity of the writs and significavits were pending before this Court and the Court of Chancery; and that the plaintiff believed the whole of the writs and significavits to be irregular, invalid, and illegal; that

(1) Cited by Lord ABINGER, C. B., in *Roberts v. Humby* (1837) 3 M. & W. 120, 125; and by Lord HALSBURY in *Farquharson v. Moryan*, '94, 1 Q. B. 552, 558; 63 L. J. Q. B. 474, 477. C. A.—R. C.

(2) This section was repealed by S. L. R. Act, 1873, "except as to any rate the payment of which may still be enforced by process of law." —F. P.

previously to the commencement of the suit he had not been summoned, nor, to his knowledge and belief, had any proceedings been taken against him, before any justice of the peace; and that previously to such commencement the validity of the rates had not, to his knowledge, been questioned in any Ecclesiastical Court. There were also statements for the purpose of shewing that the sentence of the Consistory Court was wrong on a point of practice.

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By the affidavits in answer, it appeared that Mr. Ricketts, after the affirmation of the sentence by the Court of Delegates, presented a petition, and also a supplemental petition, to the King in Council, for a commission of review, which petitions were referred to the Lord Chancellor, and rejected; that, before the significavit from the Consistory Court of Hereford issued, as mentioned in the affidavit in support of the rule, a significavit had issued from the same Court, which had been quashed for irregularity on motion before the Lord Chancellor, and that no writ *de contumace capiendo* had issued thereon; that motions were afterwards *made in Chancery to quash the three significavits mentioned in the affidavit in support of the rule; that the Court of Chancery had then quashed the significavit from the Consistory Court which had issued after the quashing of the previous one, but had sustained those from the other two; that, in the proceedings, Mr. Ricketts had questioned the validity of the rate; that, in the proceedings before the Court of Delegates, he had printed the whole of the rates of 1830 and 1832; and that, in his petition for the commission of review, he had insisted on the invalidity of the rate, on the following grounds, viz. that it contained on the face of it an unequal and fraudulent assessment, that it was made partly for an illegal purpose, that there was no proof in the cause that the rate was duly made, and with legal notice, as asserted in the libel; that the rate was not stated in the libel, though found in the sentence, to have been made at a meeting of the landholders; and that there was no proof that the inhabitants who attended were landholders. The affidavits further stated that Mr. Ricketts had never, during the proceedings, raised the question as to his not having been summoned before the justices; that the objections on the point of practice had formed the subject of the appeal; and that, before the suit

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RICKETTS commenced, Mr. Ricketts had, on being applied to for the rate,
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 a part of his land to be situate in a wrong township of the parish.

The case was argued in last Michaelmas Term, November 24th (1) and 25th (1), and in this Term, January 28th (2).

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Sir John Campbell, Attorney-General, shewed cause :

Sentence having been pronounced in each of the three Courts, no prohibition can issue : *In the Matter of Poe* (3), in the case of a court martial ; unless upon the face of the proceedings there be no jurisdiction ; *Buggin v. Bennett* (4), in the case of the Court of Admiralty ; *Blacquiere v. Hawkins* (5), in the case of the Lord Mayor's Court in London ; *Full v. Hutchins* (6), in the case of an Ecclesiastical Court. Other authorities are collected in Harrison's Digest, Inferior Courts, iii. 2, and Com. Dig., Prohibition (D). In *Gould v. Gapper* (7) it appeared, upon a declaration in prohibition, which was demurred to, that an Ecclesiastical Court had put a wrong construction on an Act of Parliament, and this Court (after sentence) directed that the prohibition should stand. There the nature of the question entertained by the Ecclesiastical Court, and the decision to which that Court came, were collected from the proceedings as set forth in the declaration in prohibition and admitted by the demurrer. That case shews how the defendant here should have raised the question of the jurisdiction of the Ecclesiastical Court, so as to make the case cognisable by this Court after sentence. If, in this case, the plaintiff were to declare in prohibition, nothing would appear but the libel and sentence. Upon demurrer, as in *Gould v. Gapper* (7), to such a declaration, the defendant must have had judgment. Supposing the proceedings to be properly before the Court, the question is, whether they necessarily shew want of jurisdiction. It will be

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(1) Before Lord Denman, Ch. J.,
 Patteson, Williams, and Coleridge,
 JJ.

(2) Before Lord Denman, Ch. J.,
 Littledale, Williams, and Coleridge,
 JJ.

(3) 39 R. R. 621 (5 B. & Ad. 681).

(4) 4 Burr. 2035.

(5) 1 Doug. 378.

(6) 2 Cowp. 422.

(7) 7 R. R. 766 (5 East, 345 ; 1
 Smith, 528) ; and see *Gure v. Gapper*,
 3 East, 472.

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of the peace power to enforce the rate in cases under 10*l.*, impliedly takes away the power of the Ecclesiastical Court in such cases; and that here the rate proceeded for appears on the proceedings to have been under 10*l.* The object of that provision was to prevent the necessity of summoning before an ecclesiastical tribunal parties who refused to pay small rates, but did not dispute their legal liability to do so, as Quakers. But, even admitting that the power of the Ecclesiastical Court is taken away by implication wherever power is given to the justices (though it might be argued that in such cases the jurisdictions are co-ordinate), still the statute gives the power to the justices only where the validity of the rate has not been questioned in any Ecclesiastical Court, and expressly saves the power of that Court, where the validity of the rate, or the liability of the person, is questioned. It does not appear on the face of these proceedings that the validity or liability was not questioned; and the Court will presume in favour of the sentence whatever is necessary to give jurisdiction: the prohibition cannot go, unless the proceedings be necessarily on the face of them without jurisdiction, and this they are not if any state of facts consistent with them can be suggested which would give jurisdiction. Further, it appears by the affidavits that the plaintiff did in fact dispute the validity of the rate.

(COLEBRIDGE, J.: How can we notice that fact upon affidavit?)

If facts not on the face of the proceedings can be noticed, the Court will see that this prohibition could not have gone even before sentence, especially as it does not appear that the plaintiff, when before the Ecclesiastical Court, made the complaint *now raised in his affidavit, that he had not been summoned before justices; and the appeals are the act of the plaintiff himself.

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Sir Frederick Pollock, contra :

The amount proceeded for is less than 10*l.* The parties had no right to unite the by-gone rates with another, in order to carry the sum above 10*l.*; and all but the last rate, which is under 10*l.*, was abandoned. Therefore it is as if the last rate alone had been demanded at first. The stat. 53 Geo. III. c. 127, s. 7,

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expressly preserves the jurisdiction of the Ecclesiastical Courts in causes touching the validity of the rate, and their power to enforce payment, where the amount exceeds 10*l*. This shews that the previous part of the section, by conferring the power upon two justices when the sum does not exceed 10*l*., takes it away in such cases from the Ecclesiastical Courts. Besides, the mere fact that there is a remedy in the temporal Courts is ground for a prohibition to the spiritual Courts (1). It is said in Co. Litt. 96 b, "And here is implied another maxim of the law, that where the common or statute law giveth remedy *in foro seculari*, (whether the matter be temporal or spiritual) the consuance of that cause belongeth to the King's temporal Courts only ; unless the jurisdiction of the Ecclesiastical Court be saved or allowed by the same statute to proceed according to the ecclesiastical laws." It is true that the Ecclesiastical Courts still retain the jurisdiction for any amount, where the validity of the rate, or the personal liability, is disputed ; but that power is preserved merely by the enactment that the *justices shall "forbear giving judgment," on receiving notice from the party, and that then the person demanding may proceed as before the Act. This shews that the jurisdiction does not vest in the Ecclesiastical Courts, where the amount is less than 10*l*., till the party has been summoned before the justices ; for he otherwise has no opportunity of giving the notice. Now here the plaintiff never was so summoned ; the proceedings in the Ecclesiastical Court are therefore merely void, and it is immaterial what the plaintiff did before a Court which had no cognisance of the question. Then it is said that the application is too late. *In the Matter of Poe* (2) is not an authority for the point contended for : there the sentence was executed before the application was made. If the matter appear to be out of the jurisdiction of the Court, the prohibition may go after sentence, and even, in some cases, after execution. The authorities are collected in Com. Dig. Prohibition (D). A cause cannot indeed be properly said to be fully over while the execution is in *feri* ; and, until all be done which the Court below can do, the prohibition may issue. Here,

(1) But see *Crunden v. Walden*, 3 Lev. 17.

(2) 39 R. B. 621 (5 B. & Ad. 681).

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as to the Consistory Court at all events, the significavit which they have issued turn out to be incorrect, and they may grant a fresh monition: *Austen v. Dugger* (1); the suit below is therefore still in *feri*. It is said that the plaintiff has chosen to appeal; but, if he had not appealed, the only difference in the result would have been that he would have earlier been in the position in which he is now. By stat. 1 Will. IV. c. 21, s. 1, application for prohibition may now be made upon affidavit only. Even admitting it to be necessary that the defect of jurisdiction should appear on the proceedings, they shew that the sum demanded was less than 10*l*. But the rule suggested on the other side as to this point is inaccurate. It is true that, in the case of superior Courts, unless on the face of the record there be necessarily a want of jurisdiction, every thing essential to the jurisdiction shall be intended; but, in the case of inferior Courts, all that is essential to the jurisdiction must appear on the face of the proceedings, otherwise the jurisdiction will not be presumed: 2 Bacon's Abridgment, Courts, D. 3 and 4; 7th ed. So that the proceedings are bad, for want of shewing that the validity of the rate, or the liability of the party, was in question.

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(*Sir J. Campbell*: The authorities cited as to inferior Courts do not apply to the spiritual Courts, which are Courts Christian and superior, though liable to prohibition if they exceed their jurisdiction. As to the argument that a new monition may issue, that, at any rate, does not apply to the Court of Arches, nor the Court of Delegates, the significavits of these two Courts having been held good, and those Courts having therefore no more to do.)

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (February 1st) delivered the judgment of the COURT:

There were three cases of application for a prohibition in the same cause; the first to the Consistory Court of the diocese of Hereford, the second to the Court of Arches, the last to the Court of Delegates, in each of which Courts successively sentence had passed against the applicant.

(1) 1 Add. Eccl. Rep. 307.

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It appeared that the original suit had been to enforce *the payment of a church-rate amounting to 4l. 6s. 8d., and that the defence had been that the rate was made at a meeting of which no due and legal notice had been given, that it was made for an illegal purpose, and shewed upon the face of it an unequal and fraudulent assessment.

On shewing cause against the motion, it was contended that the only ground of prohibition suggested was a supposed want of jurisdiction in the Court below to proceed in the matter of a church-rate, where the sum to be recovered did not exceed 10l., but that the objection, coming after sentence, was too late, unless it appeared on the face of the proceedings in that Court. And there is no doubt that, in the case of prohibitions to be granted for the sake of trial, as distinguished from those which are to be granted upon account of a wrong trial or erroneous judgment, the rule is established, that a party neglecting to contest the jurisdiction in the first instance, and taking his chance of a favourable decree, shall not be allowed after sentence to allege the want of jurisdiction as a ground of prohibition, unless the defect appears on the face of the pleadings. The justice of the rule is very apparent, and the propriety of the exception scarcely less so; for it is the duty of this Court to restrain any encroachment of jurisdiction in the inferior Courts, and therefore it interferes for the sake of the public, and not of the individual, where, the want of jurisdiction appearing on the face of the proceedings, the case might become a precedent, if allowed to stand without impeachment.

[*442] In support of the application, *Sir F. Pollock* scarcely disputed this general doctrine; but he contended that, inasmuch as, on the face of the libel, the suit appeared *to be for a rate under 10l., the want of jurisdiction was from that circumstance alone, and by itself, apparent. It is necessary therefore to examine the statute, 53 Geo. III. c. 127, s. 7, to see whether this argument is maintainable.

That section commences with a preamble, stating the expediency that church or chapel rates of limited amount, unduly refused or withheld, should in certain cases be more easily and speedily recovered. It then goes on to provide for the case of a refusal or

neglect by any one duly rated to a church rate, or a chapel rate, the validity of which has not been questioned in any Ecclesiastical Court, to pay the sum in which he is rated; and gives a summary mode of enforcement before two justices, who are empowered to order the payment of what is due and payable in respect of such rate, so as the sum ordered to be paid do not exceed 10*l*. There is then an appeal given to the Sessions against such order, with a stay of execution pending the appeal. And this is followed by the material proviso, "that nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of any church rate or chapel rate, or from proceeding to enforce the payment of any such rate, if the same shall exceed the sum of 10*l*., from the party proceeded against." If the section had stopped here, we should have thought it clear that a distinction was made between suits in which the validity of a rate was questioned, and those in which, the rate being undisputed, the only object was to enforce the payment; that, as to the former, the jurisdiction of the Ecclesiastical Courts was left wholly untouched; in the latter, it was by implication taken away *where the sum does not exceed 10*l*. This interpretation makes the enacting part of the section and the proviso consistent, and both together to form a complete enactment on the subject. But this view of the statute is made more clear by the proviso which immediately follows, that, "if the validity of such rate, or the liability of the person from whom it is demanded to pay the same, be disputed, and the party disputing the same give notice thereof to the justices, the justices shall forbear giving judgment thereupon, and the person or persons demanding the same may then proceed to the recovery of their demand, according to due course of law, as heretofore used and accustomed." This proviso applies only to cases under 10*l*.; and the effect of it is that, even in such cases, the moment it appears that the question is one not merely of enforcing payment, but touching the validity of the rate, the summary jurisdiction is at an end, and that of the Ecclesiastical Court attaches.

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If this interpretation of the section be correct, it is obvious

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that the mere fact, that on the face of the proceedings the suit appears to relate to an assessment for a sum not exceeding 10*l.*, cannot prove a want of jurisdiction in the Ecclesiastical Court to entertain the cause. Without entering into the argument at the Bar, as to presumptions for or against the proceedings of inferior Courts, or whether the doctrine applies to the Ecclesiastical Courts, it is at least undeniable that this Court ought to examine the whole of the proceedings, in order to collect from them, if it can, whether the suit, admitted to be for less than 10*l.*, was a suit in which the validity of the rate or the liability of the defendant was questioned, or whether it was merely for enforcing the payment; *this being the real point on which the question of jurisdiction must depend.

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Now, upon such examination, it is obvious that the validity of the rate, and nothing else, was in question; it follows, therefore, that there is no want of jurisdiction apparent on the face of the proceedings: and it becomes unnecessary to give any opinion upon other points made in the argument.

Considering that Mr. Ricketts has proceeded through two stages of appeal without raising the ground of objection which is now made, we cannot regret that all the authorities warrant us in discharging this rule.

Rule discharged.

In Easter Term following (April 18th) *Sir Frederick Pollock* again applied (1) for a rule to shew cause why a prohibition should not issue, on a affidavit by the plaintiff that the validity of the rate had not been questioned in the Ecclesiastical Court, nor had the defendant then disputed his liability to pay; that he should not have questioned either, if he had been summoned before justices; and that he conceived the Court to have given judgment on the supposition that he had raised such a question before the Ecclesiastical Court. The proceedings, as entered in the books of the Consistory Court, were annexed to the affidavit; and the material part of them was as follows. Mr. Ricketts was cited in the Consistory Court, in a cause of subtraction of church rates, and appeared personally. The libel, as amended,

(1) Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

stated that the churchwardens for 1829, being about to expend money *on the repair of the parish church and for other things relating to the office of churchwardens, met, January 1st, 1830, with some of the most substantial inhabitants of the parish, pursuant to legal notice, in order to make a church rate or assessment, and did make a rate at three pence in the pound, &c.; that Mr. Ricketts, at the time of the making the rate, was an inhabitant, and occupied within the parish property of certain value (specified in the libel), for which he was assessed (as specified in the libel), in 4*l.* 6*s.* 3*d.*; and that he had several times been requested to pay the same, but refused, and still did refuse to pay. Mr. Ricketts prayed to be furnished with the churchwardens' accounts for 1827, 1828, and 1829, which the Judge decreed. Certain accounts having been delivered into Court, in obedience to this order, R. objected to them as incomplete; and the Judge, upon inspection, declared them to be incomplete. Accounts having again been delivered in, R. still objected to their incompleteness; the Judge, on R.'s petition, having previously allowed him time to give his personal answers, now allowed further time, upon which the proctor on the other side waived the personal answer of R. At the next Court, R. applied for costs, in consequence of the opposing proctor having waived his personal answers, upon which the Judge took time to deliberate. The witnesses in support of the libel were then produced; and, upon R. objecting to their production, they were admitted by the Judge. R. having failed to appear at the four next successive Courts, the cause was concluded at the last of these, and R. monished to attend and hear sentence at the next Court. He appeared at *the next Court, and protested that he had not been duly monished, which the proctor on the other side denied; and the Judge read and passed sentence; by which it was declared that the proctor of John Bodenham, &c., had prayed for justice to his party, but that R. had made no prayer, and that the said proctor had fully proved, &c., and that nothing, or at least nothing effectual, had been proved, &c., on behalf of R.; and the Judge decreed that R. ought to be condemned, and did condemn him, in the rate of 4*l.* 6*s.* 3*d.* with costs.

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The Court will not refuse to revise their judgment, *ex debito justitiæ*, if it shall appear to have been founded on a misconception as to the facts. It is now shewn that the validity of the rate does not appear to have been questioned on the face of the proceedings; therefore the prohibition must go, for want of jurisdiction appearing, according to the rule referred to before, that, in the case of inferior Courts, nothing will be intended in favour of the jurisdiction. That rule was affirmed in *Winford v. Powell* (1), *Tretor v. Wall* (2), *Higginson v. Martin* (3).

(LITLEDALE, J. : Those are cases of common law Courts, which are inferior to the Courts of Westminster Hall; but Ecclesiastical Courts are not so.)

The fact that this Court will restrain the Ecclesiastical Courts by prohibition shews that they are inferior to this Court, so far as the present argument is concerned; though, in some sense, they may be termed superior Courts. An attempt was made to obtain a prohibition against the Lord Chancellor, sitting in bankruptcy, *which failed (4).

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(LITLEDALE, J. : Prohibition lies to the Courts of a County Palatine, if they hold plea of lands out of the county (5).)

Here, however, the want of jurisdiction does appear on the face of the proceedings; for the claim appears to be less than 10*l.*, which takes the jurisdiction from the spiritual Court, unless it appear on the record that the parties had previously been before justices.

(COLERIDGE, J. : Nothing appeared to raise the question of jurisdiction except the amount; and, by the statute, if the

(1) 2 Ld. Ray. 1310.

(2) 1 T. R. 151.

(3) 2 Mod. 197.

(4) In *Ex parte Cowan*, 3 B. & Ald. 123. No express decision was given on the question, whether the Court of King's Bench could prohibit the Lord Chancellor sitting in bank-

ruptcy: but the prohibition was refused, on the ground that no excess of jurisdiction appeared in the particular case.

(5) Com. Dig. Prohibition (A 1). That the Courts of the Counties Palatine are superior Courts, see *Peacock v. Bell*, 1 Saund. 73.

validity be questioned, the jurisdiction of the Ecclesiastical Court is as it was before.)

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Cur. adv. vult.

Afterwards, in the same Term (May 9th), Lord DENMAN, Ch. J. said :

The Court has looked into this question, but does not consider it necessary to add to what was previously said. There will be no rule.

Rule refused.

CLARKE AND OTHERS v. SPENCE AND OTHERS (1).

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(4 Adol. & Ellis, 448—472; S. C. 6 N. & M. 399; 1 H. & W. 760; 5 L. J. (N. S.) K. B. 161.)

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P. contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded; the first instalment when the vessel was rammed, the second when she was timbered, &c. An agent for P. was to superintend the building. The vessel was built under such superintendence, all the materials being approved by the agent before they were used. The builder became bankrupt before the ship was completed. Afterwards the assignees completed the ship. All the instalments were paid or tendered. In an action of trover by P. against the assignees for the ship :

Held, that, on the first instalment being paid, the property in the portion then finished became, by virtue of the above contract, vested in P., subject to the right of the builder to retain such portion for the purpose of completing the work and earning the rest of the price; and that each material subsequently added became, as it was added, the property of P. as the general owner.

Held, further, that under the above circumstances the ship did not pass to the assignees under the reputed ownership clause of the Bankruptcy Act.

TROVER for a ship. Plea, the general issue. The plaintiffs were merchants, carrying on business at Newcastle-upon-Tyne, under the firm of Clarke, Plummer, & Co.; the defendants were the assignees of John Brunton, a bankrupt. On the trial before Alderson, J., at the Durham Spring Assizes, 1834, a verdict was found for the plaintiffs for 1,002*l.* 11*s.*, subject to the opinion of this Court on the following case.

(1) See Sale of Goods Act, 1893 *Seath v. Moore* (1886) 11 App. Cas. 350; 55 L. J. P. C. 54.—R. C.

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On the 24th of February, 1832, Brunton, before his bankruptcy, contracted, by a written agreement, to build a ship (not now in question) for the plaintiffs, and the contract was performed on both sides. The agreement commenced with a specification, stating, under several heads of “dimensions,” “scantling,” “stores,” &c., the manner in which the ship was to be built, the materials to be used, and the outfit to be furnished; and it then proceeded as follows: “It is agreed between Mr. John Brunton, of Southwick, shipbuilder, and Clarke, Plummer, & Co. of Newcastle, that the said Mr. John Brunton will build a vessel of the before-mentioned dimensions and scantlings, in every point fully equal to the *Andromeda* in workmanship, and fit said hull out with the materials of the sizes and descriptions before *named, all of approved quality, &c. Mr. Benjamin Heward to superintend the building and outfit. The vessel to be launched in the month of July next ensuing: for the sum of 3,250*l.*, payable as follows:

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“When rammed, by bill at three months’ date, to the amount of	£400
“When timbered, the like payment of	400
“When decked, the like payment of	400
“When launched, the like payment of	500
“The residue or balance, one half at four months and six months date, to the amount of	1,550
	<hr/> £3,250 <hr/>

“John Brunton for self and Co.
“Signed at Southwick, 24th February, 1832.
“THOMAS CLARKE.”

“1832, March 22nd. Agreed with Mr. Brunton to make the vessel six inches deeper, say to be 17½ feet deep, for which he is to be paid 25*l.* On same day arranged with Mr. Heward to inspect the building of the vessel, for which he is to be paid the sum of 40*l.*

“THOMAS CLARKE.”

On the 5th of July, 1832, Brunton contracted in writing with

the plaintiffs to build them another ship, the subject of this action. The agreement was as follows :

CLARKE
&
SPENCE.

“ SOUTHWICK, 5th July, 1832.

“ MESSRS. CLARKE, PLUMMER, & Co. Newcastle.

“ SIRS,

“ I agree to build you a vessel of the following dimensions for the sum of 3,400*l.* ; ” (here followed a statement of dimensions) ; “ to be finished in every *respect similar to the vessel I contracted to build for you on the 24th of February last, with the exception of the anchors, which for the present vessel are to be of the weights,” &c. “ The vessel to be launched in the month of December next, and to be paid for in the same way as the vessel already alluded to. I am, Sirs, yours respectfully,

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“ JOHN BRUNTON.”

“ Mr. Heward to superintend the building of the within named vessel, and to be paid 40*l.* for the same.

“ T. C.”

Brunton proceeded to build the last named vessel in his yard at Southwick, and before his bankruptcy the vessel was rammed and timbered. Two instalments of the agreed price, viz. 400*l.* when the vessel was rammed, and 402*l.* 11*s.* when the vessel was timbered, were paid according to the agreement, before the bankruptcy ; and the plaintiffs also paid Brunton before his bankruptcy 200*l.* by way of anticipation on the third instalment : the payments before the bankruptcy amounting in all to 1,002*l.* 11*s.*

Brunton became bankrupt in October, 1832, after the ship was all timbered and planked (except about five planks outside), but not decked. The fiat issued, November 1st, 1832, and the defendants were appointed assignees on the 16th.

The frame of the vessel at the time of the bankruptcy, on the 15th of October, 1832, was worth 1,601*l.* 13*s.* 7*d.*, that being the value of the timber and the work done upon her. After Brunton became bankrupt, the defendants as assignees took possession of the whole of the ships, timber, goods, chattels and effects *in Brunton's yards and premises, and, amongst other things, of the frame of the vessel in question.

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On the 27th of November, 1832, the plaintiffs gave notice in writing to the defendants, then in possession of the frame of the said vessel, that the same was the property of Clarke, Plummer, & Co.; and they required the defendants to give up possession, threatening legal proceedings on non-compliance. They did not at that time tender any money. A week or two after Christmas, 1832, the defendants proceeded to complete the vessel, and, on the 7th of February, 1833, the plaintiffs gave the following notice to the defendants, addressed to them as assignees of Brunton :

“Messrs. Clarke, Plummer, & Co. having been informed that, in finishing the vessel contracted to be built for them by John Brunton, you are not proceeding in a proper and sufficient manner and according to the terms of such contract, we do therefore give you notice that they require that Mr. Heward, the person appointed by them to superintend the building of the said vessel, shall be allowed to inspect and superintend the same accordingly; and, if you refuse to accede thereto, and the said vessel should be found, when finished, to be deficient in any respect from the terms of the said contract, they will hold you personally responsible for such deficiency.”

[*452] On March 1st, 1833, when the third instalment would have become payable according to the terms of the contract, if no alteration had been produced by the bankruptcy, 200*l.*, as the balance of the said third instalment, was tendered by the plaintiffs to the defendants and by them refused. On March 23rd, 1833, the ship was *launched. A bill at three months for 500*l.*, as for the fourth instalment, was tendered by the plaintiffs to the defendants, and refused. The defendants afterwards sold the vessel for 2,600*l.* Before the sale was completed, the plaintiffs tendered to the defendants 1,750*l.* (making, with 1,002*l.* 11*s.* paid as before mentioned, 2,752*l.* 11*s.*) in payment for the vessel, and demanded the vessel from them, which they refused. It was admitted on the trial that the vessel was never of greater value than 2,700*l.*

Heward, the person appointed under the agreement to superintend the building of the vessel, was called as a witness for the plaintiffs, and stated that he was, during the building of the said

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vessel, duly authorized by them to superintend the building on their behalf. That he had been engaged in superintending the building of other vessels, as well for the plaintiffs as other persons, in Brunton's and in other shipbuilding yards. He proved that, when the pieces of timber for the vessel were ready for the keel stem and stern-post, he was sent for by Brunton to look at them previously to their being prepared for those purposes. That he went with Brunton and inspected them; and, when he had approved of them, they were immediately prepared; and, when they were ready to put together, he attended and saw the ram set up. That Brunton shewed him the plan of the vessel, and consulted with him thereon, which he approved; and, from that time until Brunton's failure, he attended at the building yard daily, to inspect and superintend the work on behalf of the plaintiffs. That three or four times, or more, during the progress of the work, he had occasion to reject parcels of timber and other things that were about to be put *into the vessel, on account of their insufficiency; and upon his making objection thereto they were removed. That Brunton once persisted in putting a timber into the ship, which Heward had objected to, on which occasion one of the plaintiffs, at Heward's instance, attended, and insisted on its being removed, and it was by Brunton's orders removed accordingly. That Heward had for several years been employed to inspect ships for various persons in the progress of the building, and that he never knew an instance of a single timber or plank, that had been passed by him and fixed in the vessel, having been afterwards removed by the builder, or timbers approved by him for building afterwards used by the builder, unless for the purpose of completing the vessel under his inspection. Brunton, after his failure, and when he understood the defendants were proceeding to finish the vessel, attended at the building yard, and stated that he had come there to inspect the progress of the work on behalf of the plaintiffs as usual; this he did for several days, until he was ordered off the premises by the foreman at the instance of the defendants.

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Evidence was offered, on the part of the defendants, that the vessel was in the order and disposition of the bankrupt as

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reputed owner at the time of the bankruptcy, which evidence was rejected.

The questions for the Court were, whether, under the circumstances above stated, the plaintiffs were entitled to maintain trover? If they were, the verdict was to be entered for the plaintiffs, damages 1,002*l.* 11*s.* If not, a nonsuit to be entered. Secondly, whether the evidence as to reputed ownership was properly rejected? If so, the verdict was to stand; if not, there was to be a *new trial. This case was argued in last Michaelmas Term (1).

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* * * * *

[465] WILLIAMS, J., in this Term (February 1st), delivered the judgment of the COURT :

The principal question raised by this case is, in whom, under the special terms of the contract entered into between the plaintiffs and the bankrupt, John Brunton, the general property in so much of the vessel as had been put together at the time of the bankruptcy was vested.

All consideration of any special property which might be in the bankrupt, by reason of a lien for monies expended on the vessel, according to the doctrine laid down in *Woods v. Russell* (2), is removed from the case by the tender of all such monies which has been made by the plaintiffs: and we desire it to be distinctly understood that, in the judgment which we are about to pronounce, we give no opinion whatever as to the soundness of that doctrine.

[466] On the part of the plaintiffs it was not denied in argument, nor could be according to decided cases, *Mucklow v. Mangles* (3), *Simmons v. Swift* (4), *Rohde v. Thwaites* (5), *Goode v. Langley* (6), *Atkinson v. Bell* (7), *Carruthers v. Payne* (8), and known principles of law, that, in general, under a contract for the building a vessel, or making any other thing not existing in specie at the

(1) November 13th. Before Patte-
son, Williams, and Coleridge, JJ.
Lord Denman, Ch. J. was absent,
being unwell.

(2) 24 R. R. 621 (5 B. & Ald.
942).

(3) 9 R. R. 784 (1 Taunt. 318).

(4) 29 R. R. 438 (5 B. & C. 837).

(5) 30 R. R. 363 (6 B. & C. 388).

(6) 7 B. & C. 26.

(7) 32 R. R. 382 (8 B. & C. 277).

(8) 30 R. R. 592 (5 Bing. 270).

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time of the contract, no property vests in the party whom, for distinction, we will call the purchaser, during the progress of the work, nor until the vessel, or thing, is finished and delivered, or at least ready for delivery and approved by the purchaser; and that, even where the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment by months and days. The builder or maker is not bound to deliver to the purchaser the identical vessel or thing which is in progress, but may, if he please, dispose of that to some other person, and deliver to the purchaser another vessel or thing, provided it answers to the specification contained in the contract. But it is urged, on the authority of *Woods v. Russell* (1), that, where the contract provides, as that in question does, that a vessel shall be built under the superintendence of a person appointed by the purchaser, and also fixes the payment by instalments, regulated by particular stages in the progress of the work, the general property in all the planks and other things used in the progress of the work vests in the purchaser at the time when they are put to the fabric under the approval of the superintendent; *or, at all events, as soon as the first instalment is paid. The facts in the case of *Woods v. Russell* (1) did not make it necessary to determine this point; neither did the decision of the Court proceed ultimately on any such point, but on the ground that the vessel, by virtue of the certificate of the builder, had been registered in the name of the purchaser, and that the builder had, by his own act, declared the general property to be in the purchaser. This appears both by the judgment itself, and by the notice taken of it by Lord TENTERDEN in the last edition of his book on Shipping, page 44. But there is a passage in the course of that judgment which goes strongly to establish the point contended for by the learned counsel for the plaintiffs; and, though the opinion expressed in that passage is extrajudicial, yet, considering that time was taken before the judgment was pronounced, and the very great learning of those by whom it was pronounced, we should certainly hesitate very much before we could come to any conclusion contrary to that

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(1) 24 R. R. 621 (5 B. & Ald. 942).

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opinion. The passage is as follows: "This ship is built upon a special contract, and it is part of the terms of the contract, that given portions of the price shall be paid according to the progress of the work; part when the keel is laid, part when they are at the light plank. The payment of these instalments appears to us to appropriate specifically to the defendant the very ship so in progress, and to vest in the defendant a property in that ship, and that, as between him and the builder, he is entitled to insist upon the completion of that very ship, and that the builder is not entitled to require him to accept any other."

If it be intended in this passage that the specific appropriation of the parts of a vessel while in progress, however made, of itself vests the property in the person who gives the order, the proposition, in so general a form, may be doubtful.

{ *468] It seems to be clear that, as, by the contract, the vessel was to be built under a superintendent appointed by the purchaser, the builder could not compel the purchaser to accept any vessel not constructed of materials approved by the superintendent; and, on the other *hand, that the purchaser could not refuse any vessel which had been so approved. It follows that, as soon as any materials have been approved by the superintendent and used in the progress of the work, the fabric consisting of such materials is appropriated to the purchaser; otherwise the superintendent might be called upon, when one vessel had been nearly constructed, to begin his work *de novo*, and superintend the building of a second: and, in this point of view, the appointment of a superintendent, by the contract, appears to be of considerable importance. As soon as the last of the necessary materials is approved and added to the fabric the vessel is complete; the appropriation is complete; and, assuredly, the general property in the vessel must vest in the purchaser, nothing remaining to be done prior to the delivery; and this is agreeable to the current of all the authorities, most of which have been cited above.

Until, however, the last of the necessary materials be added, the vessel is not complete; the thing contracted for is not in existence for the contract is for a complete vessel, not for parts

of a vessel ; and we have not been able to find any authority for saying that, whilst the thing contracted for is not in existence as a whole, and is incomplete, the general property in such parts of it as are from time to time constructed shall vest in the purchaser, except the above passage in the case of *Woods v. Russell* (1).

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Granting therefore that, under such a contract as this, the parts of the vessel, as they are added to the fabric, are appropriated to the purchaser by way of *contract, so that neither could he refuse them when the vessel should be completed, nor the builder compel him to accept any other, yet it does not necessarily follow that such appropriation vests the property in the purchaser until the whole thing contracted for is in existence, that is, until the completion of the vessel. But, in the passage under discussion, the payment under the contract is relied on as the most material point, the appropriation being effected, as it is said, by that payment : and accordingly, in *Atkinson v. Bell* (2), Mr. Justice BAYLEY, in alluding to *Woods v. Russell* (1), says, “that as by the contract given portions of the price were to be paid according to the progress of the work, by the payment of those portions of the price the ship was irrevocably appropriated to the person paying the money. That was a purchase of the specific articles of which the ship was made.”

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Now it is to be observed, in regard to the payment which is relied on in these passages, that, where an actual delivery has taken place, payment is wholly immaterial to the vesting of the property ; and further, that, by the modern doctrine and the cases above alluded to, in order to vest the property in goods under contracts of sale, it is only necessary that the identical goods which are the subject of the contract should be ascertained, and the price fixed ; and when those things are done the general property vests by the contract before actual delivery ; and the payment of the price is quite immaterial for that purpose. Whether that modern doctrine be founded on a misconception of the civil law or not, we do not think it necessary or proper *to discuss : the doctrine has been clearly laid down and acted on for many years, and ought not to be lightly disturbed ; nor does this case turn upon that doctrine. A doubt may exist

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(1) 24 R. R. 621 (5 B. & Ald. 942). (2) 32 R. R. at p. 386 (8 B. & C. 282).

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whether such a contract as the present be properly a contract of buying and selling; but, assuming it to be so, and we have so treated it for this purpose, the requisites to the vesting of the general property under the contract are clear. The payment of the instalments may indeed be evidence that the purchaser has approved of the fabric so far as it has been constructed, and may therefore as it were ratify the appropriation made by the builder; but in itself it can operate nothing, unless it be by the contract made a condition precedent to the vesting of the property.

It is not so made by the contract in question in express terms; neither was it in the case of *Woods v. Russell* (1); but we apprehend that the passage above cited from the judgment in that case is founded on the notion that provision for the payment regulated by particular stages of the work is made in the contract, with a view to give the purchaser the security of certain portions of the work for the money he is to pay, and is equivalent to an express provision that on payment of the first instalment the general property in so much of the vessel as is then constructed shall vest in the purchaser. If this notion be correct, the payment is no doubt material to the vesting of the property, and the effect of such payment is, that there is not only an appropriation of so much of the vessel as is then constructed, but also a vesting of the general property

[*471] in *so much in the purchaser, subject to the right of the builder to retain it in order to complete it, and earn the rest of the price. The rights of the parties will then be in the same state as if so much of the vessel as is then constructed had originally belonged to the purchaser, and had been delivered by him to the builder to be added to and finished; and it will follow that every plank and article subsequently added will, as added, become the property of the purchaser as general owner.

Several reasons may perhaps be adduced to shew that the more obvious intention to be collected from the terms of this contract is that, the builder requiring advances of money in the progress of an expensive work, the purchaser is contented to make such advances, provided he sees the work in such a state of progress as that he may calculate on having an equivalent for

(1) 24 R. R. 621 (5 B. & Ald. 942).

his money within a reasonable time; and therefore he stipulates that his advances shall be made at specified stages of the work.

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But, even if this be the more obvious intention, it by no means follows that the view taken of the contract by the Court in *Woods v. Russell* (1) is not correct; for the intention there supposed is not in any respect inconsistent with that which is above suggested; both may well exist at the same time: and though, if it were the intention of the contracting parties that the general property should vest in the manner supposed, such intention might have been expressed in less ambiguous terms, yet, if it can fairly be collected from those which have been used, there is nothing either in principle or *in practice to prevent the Court from carrying it into effect.

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On the contrary, as such a construction has been put on a similar contract by so high an authority in the case of *Woods v. Russell* (2), which as to this point in particular has been subsequently recognised, and as that construction has probably been acted upon, since that decision, by persons engaged in shipbuilding, we feel that we ought not to depart from such construction; and we adopt the opinion of the Court in *Woods v. Russell* (2), though with some hesitation for the reasons above assigned.

Another point was raised upon the statute 6 Geo. IV. c. 16, s. 72, with respect to reputed ownership in cases of bankruptcy, as to which it is sufficient to say that this case is plainly not within the statute; for, although the plaintiffs were the true owners of the vessel, yet it was not in the possession, order, or disposition of the bankrupt within that section, any more than a vessel or other article sent to a builder or manufacturer to be repaired is within that section. We think, therefore, that the evidence as to reputed ownership was properly rejected.

Upon the whole, we are of opinion that the plaintiffs are entitled to maintain this action of trover, and that the verdict must be entered for them for the sum stated in the case, viz. 1,002*l.* 11*s.*

Verdict to be entered as above.

(1) 24 R. R. 621 (5 B. & Ald. 942). (2) 24 R. R. at p. 624 (5 B. & Ald. 946).

1836.
Jan. 14.
[473]

POWER *v.* BARHAM (1).

(4 Adol. & Ellis, 473—477; S. C. 6 N. & M. 62; 1 H. & W. 683; 5 L. J. (N. S.) K. B. 88; S. C. at Nisi Prius, 7 Car. & P. 356; 1 M. & Rob. 507.)

In assumpsit for breach of a warranty of pictures, it was proved, among other things, that the defendant, at the time of the sale, gave the following bill of parcels: "Four pictures, Views in Venice, Canaletto, 160*l*." The Judge left it to the jury upon this and the rest of the evidence, whether the defendant had contracted that the pictures were those of the artist named, or whether his name had been used merely as matter of description, or intimation of opinion. The jury found for the plaintiff, saying that the bill of parcels amounted to a warranty.

Held, that the question had been rightly left to the jury, and that the verdict was not to be disturbed.

ASSUMPSIT. The declaration stated that, in consideration that the plaintiff, at the defendant's request, would buy of him four pictures at a certain price, to wit, &c., the defendant "promised the plaintiff that the said pictures were painted by a certain artist or master in painting, called or named Canaletti, otherwise Canaletto." Breach, that the said pictures "were not, nor was either of them, painted by the said artist or master called or named Canaletti, otherwise Canaletto," whereby the said pictures were and are of little or no use, &c., and the plaintiff lost the benefits, &c. Plea, *non assumpsit*. On the trial before Coleridge, J. at the sittings in Middlesex after last Term, it appeared that the defendant sold the pictures to the plaintiff for 160*l*., and, at the time of the sale, gave the following bill of parcels and receipt:

"Mr. N. POWER.

"Bought of J. Barham.

"May 14th, 1832.

Four pictures, Views in Venice, Canaletto,	£160	0	0
Settled by two pictures . . .	£50	0	0
And a bill at five months . . .	110	0	0
	£160	0	0

"J. BARHAM."

A carver and gilder, who had been employed by the plaintiff to

(1) See Sale of Goods Act, 1893 (56 & 57 Vict. c 71), s. 11 (1)(b).—R. C.

procure original pictures for him, gave evidence of previous representations by the defendant to *him and to the plaintiff, that the pictures were genuine; some doubt, however, was raised as to the expressions actually used. The witness stated that the pictures were in the manner of Canaletti, and, at the time of the sale, appeared to him worth the money. A witness experienced in paintings stated that he considered the pictures not to be Canaletti's, and valued them at about 8*l.* each; and some other evidence was given on this point. For the defendant it was contended that the bill of parcels was not a warranty, but only an expression of opinion; and *Jendwine v. Slade* (1) was cited. The learned Judge, in summing up, told the jury that the pictures were admitted not to be Canaletti's, and that the only question on the pleadings was, whether the promise was made; and he submitted to their consideration, upon the whole of the evidence, whether the defendant had made a representation, as part of his contract, that the pictures were genuine, not using the name of Canaletti as matter of description merely, or as an expression of opinion upon something as to which both parties were to exercise a judgment, but taking upon himself to represent that the pictures were Canaletti's. His Lordship noticed the argument on behalf of the defendant, as to the bill of parcels; and said that the words of Lord KENYON, in the case referred to, must be considered, not as a general rule of law, but as a direction to the jury on the circumstances of that case. The jury found a verdict for the plaintiff, saying, "We think the bill of parcels is a warranty."

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Sir J. Campbell, Attorney-General, now moved for a new trial on the ground of misdirection:

The question *was, whether the defendant had entered into a binding contract that the pictures were Canaletti's. The jury ought to have been told that the words in the bill of parcels did not amount to a warranty. *Jendwine v. Slade* (1) was a stronger case against the defendant than this, because the artists' names there were inserted in the catalogue of sale. But Lord KENYON said, "It was impossible to make this the case of a warranty; the

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(1) 5 R. R. 754 (2 Esp. 572).

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pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion whether the picture in question was the work of the artist whose name it bore, or not. What then does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. The action in its present shape must go on the ground of some fraud in the sale. But if the seller only represents what he himself believes, he can be guilty of no fraud. The catalogue of the pictures in question leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase." It is not necessary to contend here, that there could not be a warranty of a picture as Canaletti's; but there was no evidence of any. No fraud is imputed. No positive undertaking could be implied, from the bill of parcels, that the pictures were by Canaletti. It only implied that they passed for and were believed to be that painter's; that the vendor had bought them as his, and thought them so. It cannot be contended that every description given in a bill of parcels is a warranty.

[*476] (COLERIDGE, J.: Do you say that the writing ought not to have gone to the *jury?)

Not as evidence, by itself, of a warranty.

(COLERIDGE, J.: I said that it was to be considered with all the attendant circumstances.)

LORD DENMAN, Ch. J. :

I think that the case was correctly left to the jury. We must take the learned Judge to have stated to them that the language of Lord KENYON in *Jendwine v. Slade* (1) was merely the intimation of his opinion upon such a contract as was then before him. It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness; and that is laid down by Lord KENYON in the case referred to. But the case here is that pictures are sold with a bill of parcels, containing the words "Four pictures, Views in Venice, Canaletto." Now

(1) 5 R. R. 754 (2 Esp. 572).

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words like these must derive their explanation from the ordinary way in which such matters are transacted. It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description, or an expression of opinion. I think that their finding was right: Canaletti is not a very old painter (1). But, at all events, it was proper that the bill of parcels should go to the jury with the rest of the evidence.

LITLEDALE, J. :

The case was rightly sent to the jury; though, as to their decision, I think that all the auctioneers in London would be alarmed if they thought *that such words as these were to be understood as a warranty.

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WILLIAMS, J. :

The words in question might be a mere expression of opinion, or might amount to a warranty; it was for the jury to say which they imported. The language ascribed to Lord KENYON seems to imply that, if a master is very old, there can be no means of saying that a certain picture is his, and, therefore, no warranty. The *Attorney-General* admits that this is not correctly applicable to the present case. If a person will undertake to sell these things as the productions of a particular master, he must take the consequences.

COLERIDGE, J. concurred.

Rule refused.

(1) Canaletti died in 1768; Claude Lorraine and Teniers (the younger), the painters mentioned in *Jendwine* v. *Slade*, died, the first in 1682, the latter in 1694.

1836.
Jan. 15.

[478]

DOE D. HOBBS AND OTHERS *v.* JOHN COCKELL
AND ELIZABETH, HIS WIFE.

(4 Adol. & Ellis, 478—484; S. C. 6 N. & M. 179.)

In ejectment by churchwardens and overseers, on demises laid after stat. 59 Geo. III. c. 12, it appeared that the defendants, before and since the statute, had paid rent to the successive churchwardens, and that the late churchwardens and overseers (appointed since the statute) had given a proper notice to quit. Defendants produced a lease, made before the statute, for fifty-nine years, to parties under whom they claimed, purporting to be made with the consent of the vicar, the majority of the aldermen and burgesses of the borough of R. and of others the inhabitants of the parish, whose names were subscribed to a memorandum on the back of the lease expressing such consent. The churchwardens were the demising parties, and the rent was made payable to them and their successors for the time being. The premises were described as belonging to the parish church.

On a special case stating these facts: Held, that, notwithstanding the consent expressed as above, the premises must be taken to have been parish property, demised by the churchwardens as such: and consequently that the lease passed no legal interest in the term, and the present churchwardens and overseers might treat the lessees as tenants from year to year.

EJECTMENT for a messuage and premises in the parish of St. Mary, Reading, Berkshire. The demise was laid May 1st, 1834, and described the lessors of the plaintiff by their names, and as the churchwardens and overseers of the poor of the above parish for the time being. On the trial before Alderson, B. at the Berkshire Summer Assizes, 1834, a verdict was found for the plaintiff, subject to the opinion of this Court upon the following case:

The lessors of the plaintiff were the churchwardens and overseers of the parish when the action was commenced, and at the time of the demise laid in the declaration. The defendants and their predecessors had paid rent for the premises to the successive churchwardens, before and since the passing of the statute 59 Geo. III. c. 12, and until the expiration of a notice to quit stated in the case, which was of the same date, in the same form, and signed by the same parties, as that in *Doe d. Higgs v. Terry* (1). The defendants put in a lease *of December 20th, 1800, between John Moore and William Watlington,

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(1) *Ante*, p. 336.

DOE d.
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v.
COCKELL.

wardens of the parish church of St. Mary, Reading, of the first part; William Blackall Simonds of the second part; and the Reverend John Lichfield and Hannah his wife of the third part, and purporting to be made with the consent and agreement of the Reverend Charles Sturgess, vicar of the said church of St. Mary, and also with the consent of the major part of the aldermen and burgesses of the borough of Reading, and others the inhabitants and parishioners of the said parish, whose names were thereon indorsed, whereby, in consideration of the surrender of a former lease therein stated to be vested in the said W. B. Simonds, in trust for the said J. Lichfield and Hannah his wife, and of the sum of 12*l.* therein mentioned to be paid by Lichfield and his wife to Moore and Watlington, the premises now in question, therein described as belonging to the said church of St. Mary, were mentioned to be thereby demised to the said Lichfield and Hannah his wife, their executors, &c., to hold from Michaelmas then last, for fifty-nine years, yielding and paying to the said churchwardens and their successors for the time being, wardens of the said church, for the use of the said parish church of St. Mary, the yearly rent of 3*l.*, at Lady Day and Michaelmas. The defendants were assignees of the lessees under this lease. The lease had the following indorsement: "Memorandum; that we, whose names are hereunto subscribed, the parishioners and inhabitants of the parish of St. Mary, do consent that the within lease be made to the within named John Lichfield and Hannah his wife, at such yearly rent, and under such covenants and agreements, as within expressed. Witness our hands, the 20th day of December, 1800. *CHARLES STURGESS, vicar, W. BLANDY, alderman, W. B. SIMONDS, JAMES JAMES, FRANCIS LOCKEY, RICHARD HARBERT." It was alleged for the plaintiff, as in *Doe d. Higgs v. Terry* (1), that the lease was void; that Cockell had held as tenant from year to year; and that the notice had determined that tenancy. * * *

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The question stated for the opinion of the Court was, whether, under the circumstances, the lessors of the plaintiff were entitled to recover.

(1) *Ante*, p. 336.

DOE d.
HOBBS

[After argument:]

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LORD DENMAN, Ch. J. :

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The decision in *Doe d. Higgs v. Terry* (1) was undoubtedly correct; and there is no distinction between that and the present case. It is true that the vicar and others consented to the lease *of 1800: but we cannot assume that they had an interest. Nothing is stated beyond their concurrence. The premises appear to be demised by the churchwardens; they, therefore, had an interest in them; and the succeeding churchwardens were always recognised as the parties entitled to rent: I therefore think that the demising parties had no interest but as churchwardens. That interest could not support a demise for the term set up. * * *

LITTLEDALE, J. :

The persons whose names are indorsed on this lease are not parties to the demise; there is nothing therefore to shew that the lessors had any authority to demise except as churchwardens. Probably the intention in procuring the consent to be indorsed was only that the demise should not appear to be a job on the part of the parish officers. * * *

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WILLIAMS, J. :

The present case is not distinguishable from that decided last Term. The concurrence of the parties whose names were indorsed on the lease is immaterial: there was nothing to shew that they had any interest. The lessors demised as churchwardens; and the rent was paid to them as such. * * *

Judgment for the plaintiff.

1836.
Jan. 16.
[498]

REX v. BOULTBEE.

(4 Adol. & Ellis, 498—508; S. C. 6 N. & M. 26; 1 H. & W. 713; 5 L. J. (N. S.) M. C. 57.)

The rule, that a statute taking away *certiorari* does not bind the Crown unless named, is not limited to cases where the Crown has an actual interest, but extends to all prosecutions in the name of the King.

And the rule in favour of the Crown is not defeated by the prosecutor

(1) *Ante*, p. 336.

having become nominally defendant; as where a conviction has been quashed at Sessions, with costs to be paid by the prosecutor, and he seeks to quash the order of Sessions.

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By the Game Act, 1 & 2 Will. IV. c. 32, the justices, before whom any person is summarily convicted in penalties under that statute, may adjudge that such party shall pay the penalty immediately or at a future time, and, in default of payment, be imprisoned for a certain period: and it is enacted, that the conviction may be drawn in a certain form (corresponding with the above provision): that the party convicted may appeal to the Sessions, giving notice to the complainant of the cause and matter of appeal, within three days after the conviction; and that no such conviction shall be quashed for want of form. A party, summarily convicted under the Act, appealed, giving notice of several objections on the merits. By the conviction, when returned to the Sessions, it appeared that the party was adjudged to pay the penalty forthwith, and that nothing was said of imprisonment in case of default. The Sessions quashed the conviction on this ground, stating in their order that they quashed it for want of form. The objection was not taken in the notice of appeal, nor did it appear that the appellant, when he gave the notice, had means of knowing how the conviction would be framed.

Held, that, assuming the conviction to be defective in substance, the Sessions had no power to quash it on this objection, no notice of it having been given.

RICHARD PICKERING was convicted by the Rev. James Roberts, a justice of the peace for the county of Warwick, on the information of John Boulton, Esq., of having committed a trespass, by entering and being, in the day-time, upon a piece of land in the possession and occupation of John Rowbottom, in search of game, with a dog and gun, contrary to stat. 1 & 2 Will. IV. c. 32. The adjudication was as follows: "And I do adjudge that the said R. P. shall, for the said offence, forfeit the sum of 1*l.*, and shall pay the said sum, together with the sum of 10*s.* for costs, forthwith. And I direct that the said sum of 1*l.*, being the amount of the said penalty, shall be paid to John Breedon, one of the overseers of the poor of the said parish in which the said offence was committed, to be by him applied according to the directions of the statute in such case made and provided. And I do order that the said sum of 10*s.* for costs shall be paid to John Boulton, Esq. the complainant. Given" &c. Within the time prescribed by the Act, Pickering gave notice of appeal, *which was duly served on Mr. Boulton. Several grounds of appeal were stated in the notice, involving the merits of the information and conviction, and the notice

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concluded, "And I further give you notice that I am aggrieved by the aforesaid conviction, and shall, on the trial of the appeal aforesaid, insist on all other causes, matters, and things, which I can or lawfully may do." The appeal came on at the Sessions, and, by order of the Court, recited to be made upon full hearing of the said matter, and counsel on both sides, the conviction was adjudged to be quashed, for want of form, with costs, to be paid by Mr. Boulton to Pickering. The informality relied upon was, that the justice did not, by the conviction, adjudge that, in default of the penalty and costs being paid, the party convicted should be imprisoned and kept to hard labour, according to the

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form given by sect. 39 of the statute (1). The *causes of appeal mentioned in the notice were not gone into. Application was afterwards made to Lord Denman, Ch. J. at Chambers, on behalf of Mr. Boulton, for a *certiorari* to remove into this Court all orders of the Sessions touching the conviction and appeal, and the adjudication thereon. The application was grounded upon several objections to the order quashing the conviction, viz. 1. That the conviction was valid, and not bad for want of form. 2. That, by stat. 1 & 2 Will. IV. c. 32, s. 45 (2), no summary conviction under the Act could be quashed for want of form.

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3. That Pickering's *notice of appeal did not specify the objection in point of form, upon which the judgment of the Sessions proceeded; and that for want of such specification, which was required by stat. 1 & 2 Will. IV. c. 32, s. 44, the Sessions were precluded from entertaining the objection. 4. That, if the conviction was bad for want of form, as objected at Sessions, it was a nullity, and there was nothing to appeal against. 5. That the appeal, as entered with the clerk of the peace, was against the Rev. James Roberts, the convicting magistrate, and not against Mr. Boulton, and therefore the Sessions could not order the latter to pay costs to the appellant (3); and that the

(1) The material clauses of stat. 1 & 2 Will. IV. c. 32, which are in part repealed, except as to Ireland, by the S. I. R. Act, 1891, are in effect stated in the above head-note.—R. C.

(2) Sect. 45 enacts, "That no summary conviction in pursuance of this

Act, or adjudication made on appeal therefrom, shall be quashed for want of form, or be removed by *certiorari* or otherwise into any of his Majesty's superior courts of record."

(3) This point is not further noticed, as no decision was given upon it.

prosecutor of an information was not liable to costs for a mistake of the convicting magistrate. The *certiorari* was granted; and, the proceedings having been returned, a rule *nisi* was obtained for quashing the order of Sessions by which the conviction was quashed. A rule *nisi* was also obtained in the last Term for quashing the *certiorari*. Both rules were now discussed together.

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Hill and Kelly, against the rule for quashing the order of Sessions, and in support of the rule for quashing the *certiorari*:

The power of enforcing this penalty is given by special provision of an Act of Parliament, which must be followed, or the power fails. By sect. 39, the adjudication should be, that the party pay the penalty, or be imprisoned. This conviction adjudges that Pickering do forthwith pay the penalty, without any alternative. The judgment is imperfect, and cannot be enforced. The Sessions were bound to quash the conviction on that account. It is indeed *stated, in the order of Sessions, that the conviction was quashed for want of form, but that is not so; and, whatever the Sessions may have adjudged, if, upon the order being brought here, the Court see that it is bad in substance, they will not allow it to have any effect. It is said that the notice of appeal did not set out the objection upon which the conviction was quashed; but it is not denied that the prosecutor in fact had notice of it. The *certiorari* is taken away in distinct terms by sect. 45. It is true that the *certiorari* in this case is applied for by the prosecutor of the information; and it may be contended, on the authority of *Rex v. Allen* (1), that a clause taking away *certiorari* does not bind the Crown, unless named. But that decision was on a Revenue Act, and clearly had reference to cases where the Crown is an actual party. Here the proceeding is between individuals; the Crown does not move in it. It may be suggested that, by sect. 38 of the present Act, a party may be adjudged to pay the penalty and costs immediately, and that, if such adjudication were made and complied with, and the conviction drawn up afterwards, the alternative form would be inapplicable. But, although it is true

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(1) 15 East, 333.

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that the formal conviction may be drawn up long after the adjudication has taken place, that does not dispense with the necessity of framing it as it should have been framed if made out at the time. In felony, where a particular judgment is prescribed by law, the omission of a material part vitiates the sentence (1).

Bere and Daniel, contra :

[*503] A statute taking away the right of removal by *certiorari* does not bind the *Crown, unless there be express words for that purpose: *Rex v. Allen* (2). That was a prosecution in which the Crown had a direct interest ; but the language of the Court there admits of a general application, and the decision was grounded upon a series of cases in which the prosecutors were private persons. *Rex v. Farewell* (3), *Rex v. Clace* (4), *Rex v. Cumberland* (5), *Rex v. Bodenham* (6), are cases of that description.

(LORD DENMAN, Ch. J.: Has not the prosecutor in this case become the defendant?)

He is only so in form, like the plaintiff below, in a cause where the defendant brings a writ of error. But further, if the conviction was not in pursuance of the Act, so that the Sessions had no jurisdiction over the case, then, according to the principle admitted in *Rex v. Fowler* (7), the *certiorari* is not taken away. Here they had no jurisdiction to make this order. They could not adjudicate upon any matter of complaint which was not stated in the notice of appeal, according to sect. 44 of 1 & 2 Will. IV. c. 32; and the point on which the Sessions decided was not taken in the notice.

(LORD DENMAN, Ch. J.: The objection probably could not be discovered till the parties came into Court.

LITLEDALE, J.: The notice of appeal is to be given within

(1) See *Rex v. Fletcher*, Russ. & Ry. 58.

(2) 15 East. 333.

(3) 2 Stra. 1209.

(4) 4 Burr. 2456.

(5) 3 R. B. 149 (6 T. R. 194); in error, *The Inhabitants of Cumberland v. Rex*, 7 R. R. 792 (3 Bos. & P. 354).

(6) 1 Cowp. 78.

(7) 1 A. & E. 836.

three days after conviction. The conviction would not be drawn at that time.)

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The party intending to appeal might apply to the magistrates to have it drawn.

(LORD DENMAN, Ch. J.: Would it be in the power of the Sessions to confirm a materially vicious conviction?)

The Sessions here have stated the defect to be matter of form.

(LORD DENMAN, Ch. J.: *That is their opinion: we may think it substance.) [*504]

The observation, that the Sessions could not confirm the conviction, if materially bad, would apply to cases in which the statute allows more time for the appeal, and where the party intending to appeal has an opportunity of seeing that which he is to appeal against; as under the Act for amending the poor law, 4 & 5 Will. IV. c. 76. And, by the statute in question here, the appellant, though he had not seen the conviction, was not necessarily subjected to any hardship. If he had stated, as his ground of appeal, that he was not guilty, he might, under that notice, have taken any substantial objection: *Rex v. The Justices of Newcastle upon Tyne* (1). But, as he has alleged specific objections, the Sessions could not go out of those. And the Sessions expressly state that they have quashed the conviction for matter of form, which, by sect. 45 of stat. 1 & 2 Will. IV. c. 32, they are prohibited from doing. As to the objection itself, the statute does not imperatively require that the form there given shall be used. Enough has been adjudged here; and, at all events, the convicted party cannot complain that the full measure of punishment has not been inflicted.

LORD DENMAN, Ch. J.:

The statute gives an appeal to the Sessions, on condition that the appeal be brought not less than twelve days after the conviction, and that notice be given of the appeal, and of the cause

(1) 1 B. & Ad. 933.

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[*505]

and matter thereof, within three days after the conviction, and seven clear days before the Sessions: and the Sessions are to hear and determine the matter of the appeal, and make such order therein as to them shall *seem meet. Here the convicted party has appealed and given a regular notice. Then what were the cause and matter of appeal stated in the notice? Three objections were stated, all going directly to the merits. Those objections were the matter upon which the Sessions were to adjudicate. They were to try the merits. But they have set aside the question as to these, and decided that the conviction was bad in form. The notice could not refer to objections merely on the face of the conviction; for a conviction is seldom drawn till the time of the Sessions; and this was probably never seen by the parties before that time. The justices, being as it were impannelled to try the merits of the appeal, have proceeded to try something else. If the alleged defect was merely form, the statute cures it, and precludes them from interfering; if it was an objection in substance to the jurisdiction, and was well founded, then, although the Sessions had confirmed the conviction, no man could have justified the putting it in force: either the conviction was good, or nothing could have been done upon it. Then as to the clause (sect. 45) which takes away the *certiorari*; if there had been no decision upon similar clauses in other statutes, it would appear that such a provision bound even the Crown. But it has often been held that the right of the Crown in such cases is not to be taken away unless by express words. In *Rex v. Bodenham* (1) a distinction was attempted between cases in which the proceeding is actually that of the King, as where the revenue is concerned, and those in which the prosecution is private; and the COURT said, "In cases of this sort there is no distinction." That is a direct authority on the point. *And again, in *Rex v. Allen* (2), although the information was for penalties under a Revenue Act, and although GROSE, J. and LE BLANC, J., in their judgments, adverted to the nature of the statute, BAYLEY, J. relied upon the rule "that general words in an Act, that no *certiorari* shall be allowed, or the like, shall not bind the Crown, unless such an intention is to be collected from

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(1) 1 Cowp. 78.

(2) 15 East. 333.

REX
v.
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other parts of the Act." The rest of the Court did not, in their judgments, limit this general doctrine; and no disapprobation was expressed of the decision in *Rex v. Bodenham* (1), which was cited in argument. It is therefore perfectly clear, after much discussion of the point, that the *certiorari* is not taken away in the case of the Crown, considered generally as a suitor in a court of justice, and not merely with reference to the enforcement of any particular prerogative in respect of revenue. The rule for quashing the order of Sessions will therefore be absolute, and the rule for quashing the *certiorari* discharged.

LITLEDALE, J. :

The general rule is, that the Crown, unless named, is not bound by a statute; and that, in the cases which have been cited, has been held applicable to clauses taking away *certiorari*. A distinction has been suggested between cases in which the *Attorney-General* is proceeding directly on behalf of the Crown, or a private prosecutor to enforce a conviction, and where a party, as in this instance, is endeavouring to get rid of the costs of a prosecution in which he has failed, and stands in the situation of a defendant: but that appears *to me too refined; although the party is called the defendant, that is only by the course of the Court; he is still, in fact, the prosecutor in the proceeding below. Then as to the order of Sessions: the cause and matter of the appeal, stated in the notice, and which the Sessions were to hear and determine, was confined to three grounds of objection. The Sessions, by their order, stated to be made on full hearing of the matter, and counsel on both sides, quash the conviction for want of form. They do not decide the matter of the appeal. Want of form is not mentioned in the notice. It is true that, when notice is given, the party cannot know whether or not there is a defect of form; but, if the statute takes from him the opportunity of raising that objection, it cannot be helped: the Sessions are not, therefore, enabled to enter upon matter not included in the notice. They had not, then, any right to make this order; and the more especially, as the statute says

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(1) 1 Cowp. 78.

REX that no summary conviction under it shall be quashed for
 v. want of form.
 BOULTBEE.

WILLIAMS, J. :

I am of the same opinion. The distinction between cases in which the Crown proceeds as upon a private interest, and those in which an individual prosecutes in the name of the Crown, is somewhat invidious, and was overruled in *Rex v. Bodenham* (1). Then as to the ground of decision in the present case. Appeal is a remedy given by statute, and the Legislature, in giving, may restrict it. Probably it was intended here that the appellant should be in a great degree precluded from objections on the form of the conviction. *The appellant here, in his notice, expressly took grounds which went to the merits only. They were the “matter” of the appeal. It is true that the conviction, as drawn up, was not within his reach when he was obliged to give his notice; but, if the objection arising upon it went to the jurisdiction, then at all events the conviction would not be available; if it fell short of impugning the jurisdiction, it was merely matter of form, and defects in form are cured by the statute. The Sessions have quashed the conviction for want of form, and not upon any ground taken by the appellant.

Rule for quashing the certiorari discharged.

Rule absolute for quashing the order of Sessions.

1836.
 Jan. 18.

REX v. BOXALL AND OTHERS.

(4 Adol. & Ellis, 513—514; S. C. 1 H. & W. 741; 5 L. J. (N. S.) M. C. 78.)

[513]

Under stat. 5 & 6 Will. IV. c. 33(2), as well as by the antecedent practice, a *certiorari* obtained by one of several defendants removes the indictment as to all, and the previous recognizances of all are discharged, though the parties not applying for the *certiorari* do not give any fresh security.

Application being made, under such circumstances, for a *procedendo*, unless the defendants not suing out the *certiorari* would enter into recognizances, the Court refused a rule to shew cause.

THIS was an indictment, found at the Surrey Sessions, against thirty-three defendants, for a conspiracy, and removed, for trial,

(1) 1 Cowp. 78.

(2) Repealed by S. L. R. Act, 1891.

But this does not alter the authority of the case as to the practice.—R. C.

to the Central Criminal Court. All the defendants but three afterwards pleaded and traversed in the Central Criminal Court, and entered into recognizances, with sureties, to try there. The same attornies acted for all the defendants who traversed. Two of the last-mentioned defendants applied by the same attornies to Littledale, J. at Chambers for a *certiorari* to remove the indictment into this Court, which was granted, each of the parties giving his own recognizance in 100*l.* and two sureties in 50*l.* each. No security was given in this Court by any of the other parties.

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v.
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W. Clarkson now moved for a rule to shew cause why a *procedendo* should not issue :

The effect of the *certiorari*, if sustained, will be that, two of the defendants having removed the indictment by *certiorari*, all the others who have given recognizances and sureties will be discharged, and the prosecutor will be unable to enforce their appearance. A *procedendo*, therefore, ought to issue, at all events, unless those parties give security. The new Act, 5 & 6 Will. IV. c. 33, s. 2, as to *certiorari*, directs that “ every person indicted,” &c., who shall obtain a *certiorari*, not being in custody, &c., shall, before the allowance of the writ, enter into a recognizance, in the sums ordered by this Court or one of its *Judges, with the conditions prescribed by former statutes, and thereupon the clauses and provisions contained in the former Acts, as to costs or otherwise, shall extend to such recognizances. Here two only of thirty-three defendants have applied to remove the indictment ; and the rest offer no recognizance or surety in lieu of those which would be discharged by the *certiorari*. All the persons indicted should have entered into recognizances, before a *certiorari* was granted, of which all will take advantage. (He then adverted to facts, alleged on affidavit, as shewing that the prosecutor would be subjected to much hardship and difficulty if the *certiorari* continued in force.)

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LORD DENMAN, Ch. J. :

The practice is not altered by the late statute. Any one defendant may apply for a *certiorari* : and the circumstance that,

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BOXALL.

by his obtaining it, the recognizances of the other defendants are discharged, may serve to guide the discretion of a Judge as to granting or withholding the writ, but is no ground for a *procedendo*.

LITTLEDALE, J. :

In a case before me some time ago, I refused to grant a *certiorari* unless all the parties indicted would enter into recognizances, and they did so ; but I found afterwards that, by the practice, if they had not consented, I should have had no right to withhold the writ merely on that account. The new Act does not alter the practice.

WILLIAMS, J. concurred.

Rule refused.

1836.
Jan. 19.
[515]

MORGAN v. BROWN AND ANOTHER.

(4 Adol. & Ellis, 515—519 ; S. C. 6 N. & M. 57 ; 1 H. & W. 717 ; 5 L. J. (N. S.) M. C. 77.)

A statutory conviction of A. and B. for an offence several in its nature (as an assault under stat. 9 Geo. IV. c. 31 (1)), adjudging that they, the said A. and B., for their said offence do forfeit the sum of &c., and in default of payment be imprisoned for the space of &c., is bad, inasmuch as the penalty ought to be imposed on the parties severally, and not jointly. And a party committed under such a conviction may recover in trespass against the committing magistrate.

THIS was an action for an assault and false imprisonment. Plea, not guilty. On the trial before Williams, J. at the Shropshire Summer Assizes, 1834, it appeared that the defendants, magistrates of Shropshire, had summarily convicted the plaintiff and one Parker of an assault, under stat. 9 Geo. IV. c. 31, s. 27. The conviction was as follows : " County of Salop. Be it remembered, that on &c. R. Parker and E. Morgan are convicted before us, &c., for that they the said R. P. and E. M. on &c., at &c., did violently assault one E. Yapp. We the said justices do therefore adjudge the said R. P. and E. M. for their said offence

(1) Repealed by 24 & 25 Vict. against the Person Act, 1861 (24 & c. 95. But see s. 42 of the Offences 25 Vict. c. 100).—R. C.

to forfeit and pay the sum of 4s., and also the sum of 6s. for costs; and, in default of immediate payment of the said sums as aforesaid, to be imprisoned in the House of Correction at Shrewsbury for the space of fourteen days, unless the said sums shall be sooner paid; and we direct that the said sum of 4s. shall be paid" &c. (the fine to one of the high constables of the parish where the offence was committed, and the costs to the prosecutor). Upon this conviction the plaintiff and Parker were committed to the House of Correction. The commitment recited the conviction, and ordered that, in default of immediate payment of the sums therein mentioned, the parties should be imprisoned in the House of Correction for fourteen days, unless the said sums should be sooner paid. Among other objections on behalf of the plaintiff, it was urged that the conviction *was bad, as it imposed a joint fine upon two persons. The learned Judge held this objection fatal, and the plaintiff had a verdict. In the ensuing Term a rule *nisi* was obtained for a new trial, or to enter a nonsuit.

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Talfourd, Serjt., and *C. Phillips*, now shewed cause (1):

The fine ought to have been several. The effect of imposing a joint fine on the two parties is that, if one were willing to pay his own proportion, he could not be discharged unless the other paid his. And the adjudication ought to shew that the magistrates have exercised their judgment as to the amount of fine to be paid by each. No instance can be given in which a conviction like this has been supported.

Sir J. Campbell, Attorney-General, and *Godson*, *contrà* :

This was not a joint offence, but one for which the parties were liable severally, according to the distinction stated by Lord MANSFIELD in *Rex v. Clark* (2). By the statute, each might have been fined in the full amount here imposed. Supposing, therefore, that the effect of this adjudication were to subject either to the whole penalty, there has been no excess of jurisdiction.

(1) Three objections to the conviction were relied upon; but the judgment of the Court proceeded wholly upon that above stated.
(2) 2 Cowp. 612.

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v.
BROWN.

(LORD DENMAN, Ch. J. : In Hawk. P. C. book ii. c. 48, s. 18, it is said, "that where there are several defendants, a joint award of one fine against them all is erroneous, for it ought to be several against each defendant ; for otherwise one who hath paid his proportionable part might be continued in prison till all the others have also paid theirs, which would be in effect to punish him for the offence of another.")

[*517] It is only said that the *judgment will be erroneous. Here it is sufficient if the conviction be not a nullity. And the case supposed in that passage probably is where the judgment imposes the full fine allowed by law. By 9 Geo. IV. c. 31, s. 27, a party summarily convicted of an assault is to "forfeit and pay such fine as shall appear to" the justices "to be meet, not exceeding, together with costs (if ordered), the sum of 5*l.*" Here the magistrates have ordered the parties to pay 4*s.* and 6*s.* costs. If the exercise of their authority would not be lawful unless a forfeiture to the whole amount of 4*s.* and 6*s.* was imposed on each, the Court will construe the conviction as having that effect. They have reduced the fine in this case from 5*l.* to 4*s.* It was in their discretion to reduce it still lower. They might reduce it to 4*s.* in the case of one defendant, and nothing in that of the other, but, at the same time, adjudge that both should be imprisoned till the one fine was paid. Then, even according to the view of the case taken on the other side, the proceeding is not invalid.

LORD DENMAN, Ch. J. :

We are all clearly of opinion, on this objection, that the conviction was bad. The best mode in which the case can be put for the defendants is that, upon the conviction, it is ambiguous whether the parties are adjudged to forfeit 8*s.* or 4*s.*, and whether they are to pay 12*s.* costs or 6*s.* But that alone is a sufficient objection. A party has a right to know precisely the amount of penalty imposed upon him, in order that he may be able to relieve himself. And, besides, this is clearly a several offence, and the magistrates are bound to consider the conduct of the parties respectively in imposing the fine. The defendants

*would make the right to fine commensurate with the power ; but they have no right to impose a fine unless they are satisfied that it is the proper one. And, on a conviction like this, the magistrates may have intended one party to pay a fine little more than nominal, and the other a more considerable one ; yet the first might be imprisoned till the latter had paid his fine. It is laid down in the passage of Hawkins, already referred to, that a judgment having this effect would be erroneous. The rule must be discharged.

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LITTLEDALE, J. :

The party informing in this case might have proceeded against the plaintiff and Parker jointly or severally, either by action or criminally. The proceeding is instituted under stat. 9 Geo. IV. c. 31 : the magistrates hear the complaint, and decide that 4s. be paid as a fine, and 6s. for costs, and that the parties be imprisoned fourteen days, unless the fine and costs be sooner paid. It is not certain, upon the face of the conviction, whether the magistrates intended that each defendant should pay 4s., or that that sum should be paid between them ; but, upon the whole, I think it must be taken to mean that one fine of 4s. should be paid. Then, supposing the case were that of an indictment against two persons, could there be a judgment against them jointly, that they should pay a fine ? It is the constant practice in this Court, on judgment against several parties, where a fine is imposed, that the case of each is considered separately. By the stat. 9 Geo. IV. c. 31, s. 28, a summary conviction of assault, under that Act, is made a bar to any further criminal proceeding. The conviction, therefore, stands in the place of an indictment ; and the officers of the Court say that, on indictment, *there is no instance of a joint fine upon two persons for an assault. In *Godfrey's* case (1), referred to in the margin of the passage of Hawkins which has been cited, it is said that when a fine is imposed against law, as joint, where it should be several, it may be avoided by plea and judgment of the Court. And so in this case, the adjudication of a joint fine, being brought before the Court, may be declared

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invalid, as well as if the question had been raised by plea. The general result of the authorities cited in Hawkins, I think, is that, where a fine is imposed upon several defendants, it should be imposed upon them separately. And therefore, upon those authorities, as well as on the grounds of reason and the practice of the Court, I am of opinion that there should, in this case, have been separate fines, and that the conviction was bad, not in form but in substance.

WILLIAMS, J. concurred.

Rule discharged.

1836.
Jan. 19.
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JOHNSON v. THE CHURCHWARDENS AND OVERSEERS OF
THE PARISH OF ST. PETER, HEREFORD.

(4 Adol. & Ellis, 520—527; S. C. 6 N. & M. 106; 1 H. & W. 720; 5 L. J. (N. S.) K. B. 116.)

A. demised to B., for a term of years, two messuages; the lease contained a covenant by B., that he would, during the term, keep the premises in repair, and leave them, at the end of the term, in good repair and in the same state as they were in at the beginning. At the end of the term, the messuages were out of repair, and had been converted into a single house. B. held on without a fresh lease, and C. afterwards purchased the reversion of A., and B. continued to hold on under C. : Held,

1. That B. was not liable in assumpsit on an implied contract to put the messuages in such repair, and in the same state, as they were in at the commencement of the term.
2. That, supposing B. so liable, C. had no right of action for breaches of the contract committed before he purchased the reversion.

ON the trial of this cause at the Hereford Summer Assizes, 1834, before Alderson, B., a verdict was taken for the plaintiff, with 500*l.* damages, subject to the award of a barrister, who was to state on the face of his award any question of law which he might be requested to raise, either as to the right of the plaintiff to recover, or as to the principle on which the damages, if any, were to be settled. The arbitrator found specially as follows :

I find that, by an indenture of lease, bearing date 15th of December, 1807, Harcourt Woakes demised two messuages to Francis Gritton and William George, churchwardens, and

Thomas Day, overseer, of the poor of the parish of St. Peter in Hereford, and to their successors, for the term of twenty-one years from the 25th of December then next, at the yearly rent of 16*l.* 16*s.* payable at Midsummer and Christmas. This lease contained the following covenant by Gritton, George, and Day, for themselves and their successors, churchwardens and overseers of the parish of St. Peter for the time being: that they the said F. G., W. G., and T. D., and their successors, churchwardens and overseers, &c., shall and will from time to time, and at all times during the said term, at their own costs and charges, keep in good and tenantable repair the said messuages or dwelling houses hereby demised, and, at the end or sooner determination of the said term, shall and will quit and leave the said premises and every part thereof in such good and tenantable repair; and also they the said F. G., W. G., and T. D., churchwardens, &c., shall and will use and keep the same, and every part thereof, as and for a workhouse or house of industry for the use of the said parish of St. Peter, or for such other uses and purposes as they may think proper to convert the same, provided the said premises and every part thereof are left in the same state and condition as they are at present, at the end of the said term. The premises were occupied by the parish of St. Peter under this lease, until its expiration on the 25th of December, 1828, the two messuages having been converted into one poor-house, and continuing in that state on the 25th of December. Possession of the premises was not given up at that time; but they continued to be occupied as the parish poor-house; and the rent of 16*l.* 6*s.* per annum was paid by the parish officers for the time being until the 2nd of February, 1833, when possession was given up, after notice to quit served by the churchwardens and overseers upon the plaintiff; but the premises were not re-converted into two distinct tenements.

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I find that the interest of Harcourt Woakes in the premises had, at the time when the lease expired, become vested in one John Henderson, who afterwards conveyed the same to the plaintiff by lease and release of 9th and 10th of February, 1829. The rent payable by the parish for these premises was

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then apportioned, and a part paid over to Mr. Henderson; from which *time the rent-days were altered from Christmas and Midsummer to the 2nd of February and the 2nd of August. I find that the above covenant to repair was broken by the said Gritton, George, and Day, at the expiration of the said lease, and the dilapidations amounted to the sum of 53*l.*; and I find that that amount of dilapidations still continued at the time when the possession was given up, on the 2nd of February, 1833, but no more. And I find that the covenant for the leaving of the premises in the same state and condition as at the time of the demise was also broken at the expiration of the lease, if the Court shall be of opinion that the non-conversion of the workhouse into two distinct tenements constituted a breach thereof. If the defendants are to be considered as holding after the determination of the lease upon the terms of tenants from year to year simply, then I find that they fully repaired the premises during the whole of such their yearly tenancy, as far as such tenants are liable. If they are to be considered as holding subject to the same terms as were contained in the above lease, then, as to the amount of dilapidations, I do not find any thing to be due beyond the above mentioned sum of 53*l.*, which was so due, as already stated, on the 25th of December, 1828, and still continued due on the 2nd of February, 1833, the dilapidations being the same at both periods; but I find that the re-conversion of the poor-house into two houses, in the same state and condition as at the original demise, would have cost the sum of 5*l.*

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The declaration consisted of three counts. The first stated that, in consideration that the defendants had become tenants to the plaintiff of certain premises that had before then consisted of two separate messuages, but *which had been altered and converted into a workhouse, and so continued and remained at the time of making the promise after mentioned, upon certain terms and conditions, that is to say, that the defendants would during the continuance of the said tenancy keep the said premises in good and tenantable repair, and, at the expiration of the said tenancy, re-alter and re-convert the said workhouse in two separate houses, and restore the said premises to the same state

and condition in which they were previous to their alteration and conversion, and deliver them up in such good and tenantable repair, the defendants promised so to do: the plaintiff then alleged that the tenancy continued for a long space of time, until the defendants quitted and delivered up possession; and he stated, as a breach, that the defendants did not keep the said premises in good and tenantable repair, nor re-alter or re-convert the said workhouse into two separate messuages, or restore the said premises to their former state and condition. The second count was confined to the non-repair, and alleged that the defendants held the premises upon terms and conditions similar to those contained in the covenant of Gritton, George, and Day. The third count was the common count for not keeping in good and tenantable repair. The defendants pleaded the general issue.

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Upon the above statement of facts, I award that the verdict now entered for the plaintiff shall be set aside, and a verdict be entered for the defendants, unless the Court shall be of opinion that the plaintiff is entitled to recover the said several sums of 53*l.* and 5*l.*, or either of them; and according to such decision I award that the said verdict shall be reduced to the sum of 58*l.*, 53*l.*, or 5*l.*, with forty shillings costs.

In Michaelmas Term, 1834, *Maule* obtained a rule to shew cause why the verdict and judgment should not be entered for the plaintiffs for 53*l.*, or 5*l.*, or both sums, and the award be set aside.

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Talfourd, Serjt. and *Godson* now shewed cause (1):

The arbitrator has found properly. Both plaintiff and defendants are strangers to these covenants. The plaintiff purchased after the lease had expired, and the covenant had been broken; he took the premises as they were at the time of the sale to him; but he could not purchase a right of suing for past breaches. And the price which he paid must have been estimated upon this principle. Again, the defendants came into possession after the lease had expired, and after the

(1) Before Lord Denman, Ch. J., Littledale, and Williams, JJ.

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covenants had been broken: they could not be understood as accepting a demise subject to previous dilapidations. The policy of the poor laws is, that each year shall bear its own burthen. When the lease was entered into, in 1807, the stat. 59 Geo. III. c. 12, had not passed; the parties then taking had, therefore, no power, such as that given in s. 17, to take in succession. It is true that, in the common case of a lessee holding on after the expiration of his lease, an agreement to continue holding upon the terms of the lease may be implied: but here the implication cannot arise, because the occupiers are no longer the same. And the particular covenants, to deliver up at the end of the term, in good repair, and to re-convert the houses at the end of the term into their former state, cannot have been contemplated by parties taking after the term had expired.

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Maule and R. V. Richards, contra :

The argument, that the plaintiff had no right to sue for these breaches, assumes that the original lessor had no right to sue upon the contract arising after the expiration of the lease. If the latter could sue, the assignee of the reversion could sue. He has as much right to enforce the implied agreement, as an assignee of the original lease would have had to enforce the covenants. Then, as to the defendants, on what terms did they hold? None can be implied, except those contained in the leases, subject to the express variations as to the days of payment. This was laid down by Lord ELLENBOROUGH in *Digby v. Atkinson* (1). It is said that this construction will be contrary to the policy of the poor laws; but, if the parish officers are allowed to hold by a lease, they must be subject to the contract to repair contained in the lease. The original lessees were trustees for the parish; if so, the case falls within stat. 59 Geo. III. c. 12, s. 17, upon the authority of *Doe d. Jackson v. Hiley* (2).

(LORD DENMAN, Ch. J. : In *Digby v. Atkinson* (1) it was not put to the Court that the terms on which the holding on took place were a question for the jury. Must not the question be

(1) 16 R. R. 792 (4 Camp. 275).

(2) 34 R. R. 591 (10 B. & C. 885).

one of fact? If so, are you not bound by the arbitrator's finding?)

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As a presumption of fact, the arbitrator may leave it to the Court, as is often done in cases sent from Quarter Sessions. But it is rather a presumption of law.

(LITLEDALE, J.: If Lord ELLENBOROUGH lays it down as a conclusion of law, I think he goes too far. I always understood it to be a fact which was inferred, unless the state of things *was altered at the expiration of the lease. But, if it is an inference of law, the covenants in a lease which had expired a hundred years ago might be enforced, though there had been repeated changes of tenants.)

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Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (January 30th) delivered the judgment of the COURT. After stating the facts, his Lordship proceeded as follows :

The plaintiff relied on the general principle, that, where premises are held on by the same tenant of the same landlord, after the expiration of a lease of them, granted to the former by the latter, without a new contract, the law will imply an agreement to hold on the same terms. He cited the case of *Digby v. Atkinson* (1), where a party so continuing, having been originally bound by his covenant to keep in repair, was held liable to make good a loss by accidental fire. That case would have been applicable, if the fire had happened during the term. But if it had, the plaintiff could only have had an action of covenant upon his lease, not assumpsit on the breach of an implied contract arising out of a new tenancy from year to year, when the defendant became tenant of premises in that very condition which he is supposed to have undertaken that they should never fall into.

The change of parties produces another difficulty. The defendants were and are clearly liable to their original lessor on their breach of covenant. How then can they be also liable

(1) 16 R. R. 792 (4 Camp. 275).

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to their new landlord for the *same damage arising from the breach of their implied undertaking? This would be manifestly unjust. But there is no injustice in confining the remedy to that party with whom the covenant was broken, who has either sold the premises for a lower price for that reason, or has received the full price on the supposition that the damage is to be made good. In the former case he may sue on his own account; in the latter, as trustee for his vendee.

Something was said on the alteration of the law relating to churchwardens: but we do not think it could affect the present question, as the former lease, to whatever extent it may be binding, is not the actual contract, but only evidence of the contract that came into existence at its termination.

Verdict to be entered for the defendants.

1836.
Jan. 26.
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DOE D. SHELLEY AND OTHERS v. EDLIN AND ANOTHER.

(4 Adol. & Ellis, 582—592; S. C. 5 L. J. (N. S.) K. B. 137.)

Testatrix devised estates to N. in fee, in trust to receive and apply the proceeds to the use of S., the sister of the testatrix, for her life, and, from and immediately after the decease of S., to convey the same to such uses as S. should by deed or will appoint. There was no devise over. S. died in the lifetime of the testatrix: Held,

1. That the death of S. in the testatrix's lifetime was not an implied revocation of the will.
2. That the estate devised to N. did not lapse by reason of S.'s death, but vested in N. at the death of the testatrix.
3. That the estate so vested in N. was an absolute legal fee.

THIS case was argued in Easter Term, 1834 (May 26th), on a rule to shew cause why a nonsuit should not be entered, by *Talfourd*, Serjt. and *Cowling* against, and *Jervis* and *Justice* in support of, the rule. The judgment of the Court states the facts and discusses the authorities so fully, that a further report of them is unnecessary.

LORD DENMAN, Ch. J. now delivered the judgment of the Court as follows:

This was an ejectment, which was tried before my brother Gurney, at the Summer Assizes for the county of Oxford, in the year 1833. The lessor of the plaintiff claimed as heir-at-law to

Jane Newell, the person last seised, who died in the year 1830. The defence set up was under a will of Jane Newell, who, being seised in fee of the premises in question, on the 23rd of July, 1813, devised, amongst other things, as follows :

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“I give, devise, and bequeath unto my friend Charles Nundy, of Watlington aforesaid, draper, all my real estates, and the rest and residue of my personal estate, whatsoever and wheresoever, which I shall die seised of or entitled unto, to hold unto him, the said Charles Nundy, his heirs, executors, administrators, and assigns, upon special trust and confidence, that he the said Charles Nundy, his executors, administrators, or assigns, do and shall receive the rents, issues and profits and annual proceeds thereof, and of every part thereof, and pay and apply the same unto and to the use of my sister Mary Maretta Maria Scoolt, for and during the term of her natural life, for her own sole and separate use, as if she was sole and unmarried, and without being subject or liable to the control, debts, contracts, and forfeitures, disposal, or engagements of her present or any future husband ; and the receipts and discharges of the said Mary Maretta Maria Scoolt, and of such person or persons as she shall, from time to time, direct to receive the said rents, issues, dividends, profits, and annual proceeds, shall be good and effectual releases and discharges to the said Charles Nundy, his executors, administrators, and assigns, for so much money as in such receipts shall be acknowledged or expressed to be received. And, from and immediately after the decease of the said M. M. M. Scoolt, upon this further trust, that he the said C. Nundy, his heirs, executors, administrators and assigns do and shall convey my said real estates, and assign and transfer and pay the rest and residue of my said personal estate to such uses, upon such trusts, and to and for such intents and purposes, and with and under and subject to such powers, provisoes, and declarations, and in such parts, shares, and *proportions, as she the said M. M. M. Scoolt, notwithstanding her coverture, by any deed or deeds, writing or writings, to be sealed and delivered by her, in the presence of, and to be attested by, two credible witnesses, or by her last will and testament, in writing, purporting to be her last will and testament, or codicil, to be signed, sealed, and published by

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her in the presence of and to be attested by three or more credible witnesses, shall give, devise, bequeath, direct, limit, or appoint. And I appoint the said Charles Nundy sole executor of this my last will and testament."

Mrs. Scoolt died in the lifetime of her sister Jane Newell, four years before the summer of 1833; but the latter made no alteration in her will. Mr. Nundy, the trustee named in the will of Jane Newell, died in January, 1833, having previously made his will, dated 12th of January, 1831, by which will, after reciting the bequests in the will of Jane Newell, and reciting that the said real or personal estates were not given over in the event of the death of the said M. M. M. Scoolt in the lifetime of the said Jane Newell, and which event had happened, and that doubts were entertained whether the said Jane Newell left any heir-at-law or next of kin; he gave, devised, and bequeathed all the said real estates late of the said Jane Newell, and all the residue of her personal estate, unto Thomas Joy, his heirs, executors, administrators and assigns, to hold the same or such part thereof to which no better title could be shewn, for his and their own use and benefit; but, in case it should appear that the said Jane Newell left an heir-at-law, then to hold the same in trust to convey the said real estates to such heir; and, in case it should happen that the said Jane Newell left next of kin, then *to hold the residue of the said personal estate upon trust to assign, transfer, and pay such residue unto such next of kin.

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On these wills being proved, the counsel for the defendants submitted that the plaintiff should be nonsuited, as the effect of these wills, or rather of the first will alone, was to take the legal estate out of the heir-at-law. The counsel for the plaintiff insisted that the will had no such effect, inasmuch as Mrs. Scoolt died in the lifetime of her sister the testatrix. Mr. Baron GURNEY said he should not nonsuit the plaintiff; but he gave leave to move the Court for liberty to enter a nonsuit; and he summed up the case of the lessor of the plaintiff as to his pedigree; and the jury found a verdict for the plaintiff. A rule nisi was afterwards moved for, to enter a nonsuit; and cause has since been shewn before me, my brother Littledale, my late brother Taunton, and my brother Williams.

The objections to this will of Jane Newell branch themselves into three heads:

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First, that there is an implied revocation of the will arising from a change of the circumstances of the testatrix.

Second, that the devise is lapsed in consequence of the death of Mrs. Scoolt in the lifetime of the testatrix, and that the objects of the will having altogether failed and become inoperative, the trusts expressed in the will never arose, and the estate never vested in the trustee.

Third, that, where an estate is devised to trustees for particular purposes, the legal estate is vested in them so long as the execution of the trust requires it, and no longer; and, therefore, as soon as the trusts are either satisfied, or become inoperative and incapable of taking effect, the legal estate will vest in the person beneficially entitled to the property.

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On the first of these points was cited *Doe d. Lancashire v. Lancashire* (1). The point there decided was that, whereas it had been before considered a rule of law that marriage and the birth of a child amounted to an implied revocation of a will of lands, the Court, in *Doe d. Lancashire v. Lancashire* (1), extended the rule to the case of marriage and the birth of a posthumous child: the decision itself, therefore, has nothing to do with the present case: but the plaintiff would contend that the opinions expressed by the Judges in that case go to shew in general that an alteration in the circumstances of the deviser will amount to a revocation of the will. But the language of Lord KENYON evidently shews that he confined these circumstances to what related to the family of the testator himself, and that, if he should marry and have children, there should be a tacit condition annexed to the will itself at the time of making it, that the party does not then intend that it should take effect if there should be a total change in the situation of the family. But the change here made is the death of one of the family of the testatrix, and not new objects of affection and blood arising who would have a better claim to her bounty. Lord KENYON's language does not contemplate any such case. BULLER, J. says that an alteration of circumstances may amount to a revocation of a will of

(1) 2 R. R. 535 (5 T. R. 49).

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lands ; but his comments afterwards apply to the case then before the Court. But I know of no case where it has been held that the removal of an object of affection and bounty by death has been taken to be an implied revocation of a will ; and in my *opinion it does not operate so : I may also remark (though that would not vary the decision if the present case were within it) that the rule, as to marriage and the birth of a child amounting to an implied revocation of a will of lands, is not of universal application ; for it does not apply in cases where the whole estate is not devised by the former will ; nor where a man has been married before, and there are children of the first marriage (at least not in all such cases), nor where the marriage is in contemplation, and the intended wife, and the children the testator may have by her, after her marriage, have a provision made for them under a former will.

As to the second question, whether this is a lapsed devise, or whether the estate was vested in the trustee at all, I may here state that there is no doubt whatever, at the present day, but that a devise like the present to a trustee to receive the rents and profits, and pay them over to a married woman for her separate use, and afterwards to convey them as she shall direct, vests the legal estate in the trustee (1) ; but, as to the extent of the quantity of estate, that will be considered on the third point of the case ; and therefore this trustee had the legal estate under the will.

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The rule is well established that, if a devisee dies in the lifetime of the devisor, the estate lapses ; but that applies to cases where it is a devise of the legal estate. It has also been held in *Hartop's* case (2) that a use will lapse ; as, if an estate be devised to A. for the use of B., and B. dies, it will lapse ; but that is a use executed *by the statute, and is the same thing as if the estate had been directly devised to B.

I will not say what would be the case as to a lapse if this was a pure naked trust with nothing for the trustees to do ; as if a

(1) The plaintiff's counsel admitted this, as a general proposition, referring to *Doe d. Booth v. Field*, 36 R. R. 672 (2 B. & Ad. 564).

(2) 1 Leon. 253 ; S. C. Cro. Eliz. 243 (cited, Com. Dig. Devise (K.) p. 382).

devise was to A. and his heirs to the use of A. and his heirs in trust for B., where the trustee was a mere nominal party to keep the legal estate in him, to prevent its going to the cestui que trust, and the trustee had no duties to perform; but this is a trust where duties are cast upon the trustee; he is to receive the rents and profits; and, therefore, if rent becomes due the day after the death of the deviser, or if a field of hay or corn be to be cut, his duty is to possess himself of them. If there be no person named in the will to receive them, a court of equity must say what is to be done with them. Perhaps this illustration does not carry the case further, because, if the legal estate does not vest in him, he would in point of law be a wrong-doer in receiving the rents and profits.

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But in my opinion the legal estate does not lapse according to the rule of law applicable to lapsed devises. Whether, if the trusts become inoperative and incapable of being carried into effect, the legal estate will be taken out of him, will form the subject of consideration on the third question (1).

The third question is one of more difficulty. In *Doe d. Player v. Nicholls* (2) BAYLEY, J., in delivering his *judgment, says: "It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." And he adds that *Doe d. White v. Simpson* (3) and *Doe d. Pratt v. Timins* (4) are authorities upon that point. And HOLROYD, J. in the same case says that a trust estate is not to continue beyond the period required for the purposes of the trust.

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If the rules above mentioned, as laid down by these Judges, be

(1) In addition to the cases referred to in the judgment, the plaintiff's counsel cited *Doe d. Burdett v. Wright*, 21 R. R. 461 (2 B. & Ald. 710) (second point), as shewing that, where an estate is devised on a trust which cannot be executed, the devise itself becomes void, or at all events (no beneficial interest being devised to the trustee) the legal use results

to and is executed in the heir-at-law; on which last point they referred to the judgment of HOLROYD, J., p. 723. They also cited Com. Dig. Uses (D 2): "So, if the use declared is void or impossible," &c.

(2) 25 R. R. 398 (1 B. & C. 336).

(3) 5 East, 162.

(4) 1 B. & Ald. 530.

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confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require as far as is expressed by the words used in the instrument itself, or by the apparent intention of the maker of the instrument consistent with the language of it, then I admit the rule to be correct. But if it be meant to apply to all cases in general where the trusts are no longer capable of being carried into effect, but yet the instrument, by the legal construction of it, already gave an estate which might continue for a longer period than that during which the objects of the trust had an actual existence, then that in my mind will admit of a different consideration.

I admit that, for a great number of years past, the Courts have held that trustees take that quantity of interest which the purposes of the trust require; and the question is, not whether the maker of the instrument has used words of limitation or expressions adequate to convey an estate of inheritance, but whether the *exigencies of the trust require a fee, or can be satisfied by a less estate.

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This is established in a great variety of cases not necessary for me to go through: they are of a very multifarious description, and many of them embracing very nice distinctions, and admitting a difficulty in their being reconciled.

I am satisfied with their establishing the rule as I have above admitted; they will be found in the references in the case *Doe d. Player v. Nicholls* (1), above referred to, and in the references in the cases of *Doe d. White v. Simpson* (2), and *Doe d. Pratt v. Timins* (3), above mentioned to have been cited by Mr. Justice BAYLEY; and I may refer to the subsequent cases of *Warter v. Hutchinson* (4), *Glover v. Monckton* (5), *Doe d. Brune v. Martyn* (6). But these cases are such as that the Courts held upon the construction of the instruments themselves, and for the purpose of carrying the trusts into execution, and in some instances coupled with the apparent intention of the testator, that the trustees took only an estate either for years, or for an uncertain chattel interest, or for the lives of themselves or others, or a base fee

(1) 25 R. R. 398 (1 B. & C. 336).

(2) 5 East, 162.

(3) 1 B. & Ald. 530.

(4) 25 R. R. 551 (1 B. & C. 721).

(5) 28 R. R. 559 (3 Bing. 13).

(6) 32 R. R. 450 (8 B. & C. 497).

determinable upon certain events ; and that construction has been put upon the various wills, though in some of them the testator has used words of limitation, or which of themselves alone, if not coupled with other expressions, would seem to carry an estate of inheritance.

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But I think that, in this instance, the testatrix has used words which carry an estate of inheritance, and *that there is nothing in her will, either in expression or apparent intention, which shews that the exigencies of the trust can be satisfied by the trustee taking a less interest than an absolute estate in fee simple. The trustee is to convey for such estate as the sister of the devisee may direct, and, therefore, may have to do so in fee ; he cannot do this unless he has an absolute fee, which he can convey. He cannot be said to have a base fee determinable upon certain events, for what is the event on which his fee is to determine ? The answer is, his conveying the property. But when he conveys there is an end of his trust and estate altogether, which thereby becomes executed : but that is nothing like a base fee determinable upon events which make it cease before it comes to its natural termination in its character of a fee simple of inheritance. A determinable fee ceases upon the happening of a certain event without the aid of a conveyance. But this estate of the trustee cannot cease until he has made a conveyance of a fee, or some beneficial interest, so as to execute his trust. Till that is done I think that the trustee retains the legal estate : and it is no answer to say that some collateral events have disabled him from carrying the trusts into effect.

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I have not adverted to the case of *Burgess v. Wheate* (1), cited in the argument, as I do not think it would go to decide any part of the present question, even if it could be taken as clear and undoubted law ; as to which see Lord Henley's note in page 259 of the case.

I am of opinion, therefore, that the legal estate is out of the lessor of the plaintiff who claims as heir-at-law, *and that he cannot recover in ejectment ; and, consequently, the rule to enter a nonsuit must be made absolute.

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Rule absolute.

1836.
Jan. 29.

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REX v. HENRIETTA LAVINIA GREENHILL (1).

(4 Adol. & Ellis, 624—645; S. C. 6 N. & M. 244.)

Where a person supposed to be improperly in custody is brought up on *habeas corpus*, the Court, if there appear no ground for restraint, will order that such person be at liberty to go where he pleases, and will, if necessary, give him the protection of an officer in going. But, if the party be a legitimate child, too young to exercise a discretion, the legal custody is that of the father; and, if the mother has possessed herself of the child adversely to him, and he claims it, the Court will oblige her to deliver it up.

Nor will this rule be departed from on the ground that the father has formed an adulterous connection, which still continues, if it appear that he has never brought the adulteress to his house or into contact with his children, and does not intend to do so.

Semble, that the child would not be given into the father's custody if it appeared that in his hands it would be exposed to cruelty or to gross corruption.

On the 23rd of October, 1835, Benjamin Cuffe Greenhill, Esquire, of Knowle Hall, Somersetshire, obtained a *habeas corpus*, commanding his wife, Henrietta Lavinia Greenhill, to produce the bodies of their three children before Patteson, J., at his house. The writ was obtained on an affidavit by Mr. Greenhill, stating that he had been residing with his said wife and children at Weymouth till the 23rd of the preceding September, or thereabouts, when Mrs. Greenhill, in his absence, left the house and went to her mother's at Exeter, where she had ever since continued, and refused to return. That, after her departure, September 26th, her brother, Captain Macdonald, at her instigation went to Weymouth, broke up Mr. Greenhill's establishment there, and, without his authority, took and conveyed the said children, females, aged, respectively, five years and a half, four and a half, and two and a half, to the house of Mrs. Greenhill's mother at Exeter, where they had ever since been in the custody of Mrs. Greenhill, against the will of Mr. Greenhill; and that he, as their father, claimed the custody and

(1) See this case, and various others bearing upon the same points, cited by LINDLEY, L. J., in *Thomasset v. Thomasset*, '94, P. 295; 63 L. J. P. 140. See now also the clauses of the Matrimonial Causes Acts,

1857 to 1878 (20 & 21 Vict. c. 85, ss. 33, 35, 45; 22 & 23 Vict. c. 61, s. 4, and 58 & 59 Vict. c. 39). See also the Guardianship of Infants Act, 1886 (49 & 50 Vict. c. 27, ss. 5 and 7).—R. C.

possession of them as a right, which he would not in any way abuse. The children were brought to the house of the learned Judge in obedience to the writ; but *their further attendance was dispensed with, it being stated by Mr. Chambers, Mrs. Greenhill's uncle, that they would be at his house in the immediate neighbourhood, and would be produced in ten minutes, when it became necessary. And affidavits were put in on behalf of Mrs. Greenhill, in answer to that of her husband. She herself stated as follows: The permanent residence of Mr. and Mrs. Greenhill was Knowle Hall. Mr. Greenhill was in the habit of leaving Mrs. Greenhill for short periods, during which the children were under her entire controul. In the summer of 1885, Mr. Greenhill arranged that they should go, with the children, to Weymouth for a month or two; and that Mrs. Greenhill and the children should proceed from thence to the house of her mother at Exeter, about the 1st of October. The object of the journey to Weymouth was amusement and health. They arrived there about July 11th, and occupied furnished lodgings. Mr. Greenhill had a pleasure-yacht, in which he frequently left Weymouth on short excursions. The last time of his leaving Mrs. Greenhill there was September 7th, when he sailed for Portsmouth, after which he went to London; and on September 24th she received information as to his conduct, which rendered it necessary, in her opinion, to remove immediately, with her children, to her mother's house at Exeter. She accordingly left Weymouth, and, on September 26th, had her children conveyed to Exeter. They remained under her care, at her mother's house, till October 27th: and she then, in obedience to the *habeas corpus*, brought them to London, where they resided, with her, at the house of her uncle, Mr. Chambers. Mrs. Greenhill further expressed her belief that, if her husband were permitted to have the custody and controul *of the infants, their welfare and interests would be prejudicially affected thereby; and that her husband's mother, with whom it had been suggested that they might be placed, was, from circumstances which the affidavit set forth as to her temper and disposition, an improper person to have the charge of them. Mrs. Greenhill also stated that she had not herself done any act which could render her

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unworthy or unfit to have the custody of the children ; and that her husband could at any time have, and had in fact had, access to them where they then were. By other affidavits it appeared that Mr. Greenhill had, during the years 1834 and 1835, lived in continued adultery with a Mrs. Graham, cohabiting with her at various lodgings in London and at Portsmouth ; the intercourse at the latter place having been still carried on after the arrival of Mrs. Greenhill and her children at Weymouth : that during such cohabitation Mr. Greenhill and Mrs. Graham had at times assumed the names of Mr. and Mrs. Greenhill, and Mr. and Mrs. Graham ; that in the month of October, in which the *habeas corpus* was obtained, they were living together under the latter names at a lodging in London ; and that in that month he had acknowledged to Mr. Chambers, the uncle of Mrs. Greenhill, that the adultery was still continuing, and had refused to part with Mrs. Graham while uncertain of a reconciliation with his wife. There was also an affidavit that Mr. Greenhill had, in the same month, gone with a female to a common brothel, where it was believed they had passed the night. Mrs. Greenhill's uncle deposed, from his knowledge of the "character, disposition, and conduct" of Mr. Greenhill, that he was not, in the deponent's opinion, a fit and proper person to have the *care and custody of the children ; that, if they were entrusted to him, there was great danger that they would not be properly educated and taken care of ; and that Mrs. Greenhill was in all respects a proper person to have the care and custody of them. The grandmother of Mrs. Greenhill deposed to the same effect, and that, if the children were placed with their father, there was great probability that they would be "brought into contact with a female of an abandoned and profligate character : " and she also stated that Mr. Greenhill's mother was an improper person to be entrusted with the children, being unkindly disposed both towards them, and towards Mrs. Greenhill.

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After the suing out of the *habeas corpus*, and before its return, a petition, founded upon the above affidavits on behalf of Mrs. Greenhill, was presented to the Vice-Chancellor, praying that it should be referred to one of the Masters of the Court to report who was a fit and proper person to be the guardian of the said infant

children, &c. The petition was heard, and dismissed, while the *habeas corpus* was depending before Patteson, J. On the 10th of November, PATTESON, J., after taking time for consideration, ordered that Mrs. Greenhill should deliver up the children to her husband. In the then Michaelmas Term, November 12th, that order was made a rule of Court. The rule was served on Mrs. Greenhill, November 12th, and the children demanded: but she refused to give them up. On the 18th a rule *nisi* was obtained for an attachment against Mrs. Greenhill for her contempt. In the same Term, November 17th,

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Wilde, Serjt. moved, on behalf of Mrs. Greenhill, for a rule calling on Mr. Greenhill to shew cause why the *order of PATTESON, J., should not be set aside, and the rule, making it a rule of Court, discharged. The motion was grounded on an affidavit (among others) by Mrs. Greenhill, stating, in addition to facts which have been already mentioned, that the children had been always brought up under her personal superintendence and care, and that, without her personal attention, their health and comfort would suffer; that, according to her belief, the connection between Mr. Greenhill and a female of immoral character still continued; that Mrs. Greenhill had had two interviews with him since she came to London in obedience to the writ, and that in neither did he pledge himself to put an end to such connection; that, as she was informed and believed, he had taken a house for the said female for a term of years, and intended to reside with her permanently; that the children were kept under no restraint, were attended by the same nurse as when they were at Weymouth, and had never been withheld from their father, who, on the contrary, had been offered free access to them at all times; that Mr. Greenhill had always admitted the propriety of Mrs. Greenhill's conduct as a wife and mother; that he would not inform Mrs. Greenhill how he intended to dispose of the children; that Mrs. Greenhill had instituted proceedings (which were then depending) in the Ecclesiastical Court for a divorce and alimony, because the conduct of her husband was such that she could not with propriety reside longer with him, and that she believed the *habeas corpus* to

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have been obtained for the purpose of affecting that suit ; that she only desired permission to continue bestowing upon her children the same personal care and attention which they had hitherto received from her, and which was necessary to their welfare ; *and that she had always been ready and willing, and offered, and did then offer, to reside in any place, save, under present circumstances, in her husband's own house, and to act with respect to the said children, and their management, education, and disposal, precisely as her husband might dictate. She further stated that she would consent even to relinquish the custody and controul of the children, if, by the rule or other direction of the Court, she might be assured of permission to give them her personal care and attention during their tender years. It appeared by another of the affidavits now put in, that Mrs. Greenhill's age was twenty-four and that of her husband twenty-eight.

Wilde, Serjt. in moving for the rule, stated the proposal of Mrs. Greenhill to be, that she should not part with the children, but that they should be placed where her husband should appoint, she having access to them for the purpose of giving them her care and attention, subject to his directions. The question raised by these proceedings is, not whether the father's right over his children be paramount, but whether the rights of the mother are to be wholly disregarded, so that she may not claim access even to infants within the age of nurture. The law cannot require that, if a husband makes his own house unfit for his wife's residence, his children shall, therefore, be deprived of the maternal care and protection.

(LORD DENMAN, Ch. J.: Has Mrs. Greenhill gone with the children to her husband, and made the proposal you now mention, and has it been rejected ?

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PATTESON, J.: All that appeared before me was, that she had left her husband's house, and the children in it ; that her brother had gone to the house and *brought the children away ; and that Mrs. Greenhill had then gone with them to Exeter, and had afterwards said she would not deliver them up.)

The place she left was only a lodging-house, taken for a limited time; and she went from thence to the place which her husband had appointed.

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(PATTESON, J. : At any rate she went much before the time.)

None of the authorities go so far as to bear out the present motion. In cases where the child has been actually in the father's possession, this Court has declined to interfere, no doubt considering its power inadequate to alter such a state of things; but those cases differ from the present; and, in a case (that of *Mr. Lytton* (1)) where the father had bound himself by an agreement in articles of separation to allow the mother access to the child, the Court would not suffer him to take it from the school at which it had been placed, without providing for the future access of the mother. The only instances in which the Court appears actually to have taken away the child from the mother are *Sir William Murray's* case (2), and *Ex parte M'Clelland* (3).

(PATTESON, J. : In that case the child had been placed at a school by agreement between the father and mother; the mother persuaded the governess to let the child go to her for a few days, under a promise to restore it, and then kept it. I thought there was an absurdity in saying that, if the husband took the child by force, the Court would not remove it from his possession, and yet that it would not assist him in obtaining the possession, when he sought it by the legal course of a *habeas corpus*.)

Where he actually has the custody, *the power of the Court is limited; where he has it not, the Court will exercise its discretion according to the circumstances. In *Rex v. Smith* (4), where a boy was brought up by *habeas corpus* at the instance of his father, for the purpose of having him delivered over by an aunt who kept him, the Court, over-ruling *Rex v. Johnson* (5), refused

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(1) Cited in *Rex v. De Manneville*,
7 R. R. 694 (5 East, 222).

(3) 1 Dowl. P. C. 81.

(4) 2 Stra. 982.

(2) Cited in *Rex v. De Manneville*,
7 R. R. 695 (5 East, 223).

(5) 1 Stra. 579; S. C. 2 Id. Ray.
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to do more than order him to be delivered out of the custody of the aunt, and inform him he was at liberty to go where he pleased. And in *Rex v. Sir Francis Blake Delaval* (1) Lord MANSFIELD states the law to be, that, "In cases of writs of *habeas corpus* directed to private persons, to bring up infants, the Court is bound, *ex debito justitiæ*, to set the infant free from an improper restraint: but they are not bound to deliver them over to any body, nor to give them any privilege. This must be left to their discretion, according to the circumstances that shall appear before them." He then refers to the two cases in *Strange*, just cited, and a third, *Rex v. Clarkson* (2), and adds, "The true rule is, that the Court are to judge upon the circumstances of the particular case; and to give their directions accordingly." And, in the case then before the Court, in which a father had obtained a *habeas corpus* to bring up his daughter, Lord MANSFIELD said, that there was no reason for delivering her to her father, and the order was that she should be discharged from all restraint, and be at liberty to go where she would. In *Rex v. Wilson* (3), which came before this Court in 1829, on the application of a father, the Court referred it to the Master to see what was proper as to the *custody; and, in *Rex v. Dobblyn* (4) the Court refused to let the father have the custody of the infant. The object of the writ of *habeas corpus* is the liberty of the party detained; and the application ought properly to come from him: *Rex v. Reynolds* (5), *Rex v. Edwards* (6); though, where the party himself is of too tender years to decide upon the custody in which he ought to be, the law vests the discretion on that subject in the father. But, where he attempts to use that discretion, not in truth for the purpose of enforcing his own rights, but to take away those of the mother, the children being within the age of nurture, and no reason being shewn for abridging the mother's rights, the Court will at least interpose so far as to leave the father such a qualified dominion only, as the circumstances require, and as may be consistent with the interests of the children themselves. The whole question is, whether the case be one in which the

(1) 3 Burr. 1434.

(2) 1 Stra. 444.

(3) See p. 433, *n.*, *post*.

(4) See p. 452, *n.*, *post*.

(5) 6 T. R. 497.

(6) 7 T. R. 745.

Court can use its discretion; and whether the rights of the husband be so far paramount to those of the wife, that she has no right to stand before the Court enforcing any claim. A rule *nisi* was granted.

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In opposition to the rule, affidavits were put in on behalf of Mr. Greenhill, to the following effect: Mr. Greenhill's solicitor, Mr. Browne, swore that, before the issuing of the *habeas corpus*, he had gone to Mrs. Greenhill, at Exeter, with Mr. Greenhill's sanction, for the purpose of effecting a reconciliation or arrangement, which, however, he had been unable to bring about, and had ultimately demanded, while at Exeter, that the children should be placed under his protection to be taken to Knowle Hall; that Mrs. Greenhill refused *this, and the *habeas corpus* afterwards issued: that Mr. Greenhill, in his communications with the deponent, had evinced great affection to the children, and that they, in an interview which the deponent had witnessed between them and their father, had shewn a strong attachment to him: that, upon the service of the rule of Court of November 10th, for the delivery of the children by Mrs. Greenhill, she had refused to give them up, and expressed her determination not to live again in the same house with her husband: and that she had asked him what he meant to do with the children, to which he had replied that he should take them to Knowle, and that she might see them whenever she pleased. Mr. Greenhill, by another affidavit, denied that any arrangement had been made with his consent for Mrs. Greenhill to go from Weymouth to Exeter. He further stated that, in the beginning of October last, when informed of his wife's reasons for leaving Weymouth, he had expressed to her brother and uncle his contrition for what had passed, and had offered, if she would forgive him, to live with her wherever she wished, and to give up his intimacy with Mrs. Graham, and that he had made other attempts at reconciliation, without success. That the children, if taken out of his custody, would lose materially by family arrangements, which, to his knowledge and belief, would essentially affect their future interests: that his wife had no means of supporting them; that the children, if separated from him, would, as he believed, be brought up in detestation

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of him; and that his mother was a very proper person to be entrusted with them: that he had (before Mr. Browne went to Exeter) proposed to Mrs. Greenhill's attorney that she should leave her mother's house and *live somewhere in or near London, in which case he had offered that she might have the children under her care, but this had not been acceded to: that he never contemplated for a moment depriving his wife of the privilege she had, as a mother, of seeing her children, and had repeatedly expressed himself to her to that effect: that Mrs. Graham had never seen either of the children or Mrs. Greenhill, nor had he ever taken either of the children near Mrs. Graham's residence, or Mrs. Graham to Knowle Hall or any other place where his children or wife were, nor had he entertained the thought of bringing his children or wife in contact with Mrs. Graham, having always loved his children, and been loved by them, with the warmest affection: and that he had never given his wife occasion to complain of any unkindness or want of affection in him towards them: that it was his intention to take them to Knowle, his own residence, where he proposed they should reside under the care of his mother, and where he had always been ready and willing that his wife should have free access to them, as he had frequently told her. Upon these affidavits, *Talfourd*, Serjt., in the same Michaelmas Term (November 24th), was partly heard in opposition to the rule; but, the Court suggesting that some agreement might perhaps be come to, the rule was enlarged to this Term. From affidavits subsequently sworn by, and on behalf of, Mr. Greenhill, it appeared that Mrs. Greenhill had left Mr. Chambers's house with the children; that Mr. Greenhill had since made unsuccessful attempts to discover where they were, and that, from information he had obtained, he believed that Mrs. Greenhill had taken them with her out of the kingdom.

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Sir John Campbell, Attorney-General, *Talfourd*, Serjt. and *Wightman*, now shewed cause against the rule for setting aside the order of *PATTESON*, J. * * *

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Sir W. W. Follett and *J. Henderson*, *contrà*. * * *

LORD DENMAN, Ch. J. :

As, unfortunately, the attempts to reconcile the interests of these parties have failed, we are bound to pronounce our judgment upon the application before us. There is, in the first place, no doubt that, when a father has the custody of his children, he is not to be deprived of it except under particular circumstances; and those do not occur in this case; for, although misconduct is imputed to Mr. Greenhill, there is nothing proved against him which has ever been held sufficient ground for removing children from their father. If we look strictly at the evidence, this will, I think, be found a case falling within the general rule just stated, with respect to the custody, for, when *the children were in a house rented by the father, and in the charge of those with whom he had appointed that they should be, the mother's conduct in causing them to be removed was equivalent to taking them out of his custody: and, if so, then, *ex concessis*, he has a right to claim that they shall be restored. But I think that the case ought to be decided on more general grounds; because any doubts left on the minds of the public as to the right to claim the custody of children might lead to dreadful disputes, and even endanger the lives of persons at the most helpless age. When an infant is brought before the Court by *habeas corpus*, if he be of an age to exercise a choice, the Court leaves him to elect where he will go. If he be not of that age, and a want of direction would only expose him to dangers or seductions, the Court must make an order for his being placed in the proper custody. The only question then is, what is to be considered the proper custody; and that undoubtedly is the custody of the father. The Court has, it is true, intimated that the right of the father would not be acted upon where the enforcement of it would be attended with danger to the child; as where there was an apprehension of cruelty, or of contamination by some exhibition of gross profligacy. But here it is impossible to say that such danger exists. Although there is an illicit connection between Mr. Greenhill and Mrs. Graham, it is not pretended that she is keeping the house to which the children are to be brought, or that there is anything in the conduct of the parties so offensive to decency as to render it improper that the

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children should be left under the control of their father. And he promises the same conduct with respect to them for the future. The present *rule was not granted because the Court entertained much doubt, but from a desire to avoid increasing the misfortunes of this family. It may be that a modified order, if we made it, would be obeyed by Mrs. Greenhill; but I do not feel that we should be justified in making such an order: and, the question now being whether or not the order of my brother PATTESON should be obeyed, I am of opinion that this rule must be discharged.

LITTLEDALE, J.:

I am of the same opinion. The practice in such cases is that, if the children be of a proper age, the Court gives them their election as to the custody in which they will be; if not, the Court takes care that they be delivered into the proper custody. If this were a case in which the father and mother disagreed as to the disposal of the children, and they were brought from a distant place in the charge of some other person, and each of the parents appeared before the Court, and claimed the custody, there is no doubt that the Court would give it to the father; the mother's application would not be attended to. Here the case is stronger; the children were, in effect, in the custody of the father, in a place selected by him; they have been removed, and he only seeks to bring them back. On the question which comes before us, whether or not the learned Judge's order should be set aside, I think we have here no right (and I do not say that we should have it in any case) to make an order about access to the children or interference with them. We can only discharge the rule.

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WILLIAMS, J.:

In this case, as it came before my brother Patteson, he was bound to decide, in point of law, with whom the custody of the children should be. In general, where the party brought up by *habeas corpus* is competent to exercise a discretion on this point, the Court merely takes care that the option shall be left free.

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In *Rex v. Sir F. B. Delaval* (1) the party was of such an age ; and the Court acted accordingly. But where the age is not such as to allow the exercise of a discretion, and there is a controversy as to the custody, the Court must decide ; and here the learned Judge, having no doubt of the law (and I accede to his view of it), made the order in question, giving the custody to the father. Then is there any thing shewn which can induce us to suspend or set aside that order ? It has been held (2) that the fact of a father having formed an improper connection is not of itself sufficient reason for separating his children from him. The same question was before my brother Patteson, and is now before us for reconsideration. The right is in the father, and must take effect.

COLERIDGE, J. :

The single question before the Court is, whether or not this order shall be discharged. It is important to consider the circumstances under which the order was made. A *habeas corpus* issued, and was obeyed. The mother and children were before the learned Judge ; but it was then arranged that, during the future attendance, the children's presence should be dispensed with. There was not, therefore, any thing *special in the order ultimately made ; it was only what the learned Judge might have said verbally to the father if the children had been in attendance with the mother, " You are entitled to the custody of these children." The rule, then, is to be considered upon purely legal principles. A *habeas corpus* proceeds on the fact of an illegal restraint. When the writ is obeyed, and the party brought up is capable of using a discretion, the rule is simple, and disposes of many cases, namely, that the individual who has been under the restraint is declared at liberty ; and the Court will even direct that the party shall be attended home by an officer, to make the order effectual. But, where the person is too young to have a choice, we must refer to legal principles to see who is entitled to the custody, because the law presumes that, where the legal custody is, no restraint exists : and, where the child is in the hands of a third person, that presumption is

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(1) 3 Burr. 1434.

(2) *Ball v. Ball*, 2 Sim. 35.

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in favour of the father. But, although the first presumption is that the right custody according to law is also the free custody, yet, if it be shewn that cruelty or corruption is to be apprehended from the father, a counter-presumption arises: that, however, is not raised here. The case, as it comes before us, is the same as if the parties, with the children, were on the floor of the Court, and we had to pronounce what was the rightful custody. The rule, therefore, must be discharged.

Rule discharged.

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The *Attorney-General* then moved that the rule for an attachment might be made absolute; and, no argument being offered in opposition,

The rule was made absolute; but it was ordered that the attachment should lie in the office for a month (1).

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(1) The reporters are indebted to Mr. Dealtry for the following notes of two cases referred to in the argument of *Wilde*, Serjt., *ante*, p. 446.

REX v. DOBBYN.

A father claiming from his wife the custody of their legitimate infant child on *habeas corpus*, the Court, on a representation by the wife of his profligacy and cruelty, referred it to a barrister to determine as to the proper custody for the child, the wife (who was in contempt for disobeying the writ), and the husband, consenting to abide by such determination.

In Michaelmas Vacation, 1817, Lord ELLENBOROUGH issued a summons, at the instance of William Augustus Dobbyn, calling upon Maria Philippa Dobbyn, his wife, to shew cause why a writ of *habeas corpus* should not issue to bring before him the body of Philippa Dobbyn, their daughter, aged six years, for the purpose of her being

delivered over to the father. The summons was attended before Mr. Justice Holroyd, who ordered the writ to issue.

The defendant having neglected to make any return to the writ, Lord ELLENBOROUGH issued his warrant pursuant to the statute 56 Geo. III. c. 100, to apprehend the defendant, in order that she might find bail for her appearance in the Court of King's Bench on the first day of the following Hilary Term, to answer the contempt. She was apprehended under the warrant, and entered into a recognisance to appear accordingly.

On the first day of Hilary Term she appeared in Court, and was asked whether she would undertake to appear before a Judge at Chambers, and bring the said Philippa Dobbyn with her, which she declined to do; whereupon she was examined upon interrogatories, and reported in contempt. The reasons alleged by her for not giving up the child were, that the time of the father was principally devoted to the gaming

table and the society of women of infamous character; that he, having attempted the life of the defendant, was likely to do the same to the child; and that he was of a brutal disposition; that he had beat defendant with a stick, and desired the woman with whom she lived to turn her out of doors, declaring she was not his wife, but his discarded mistress; that on one occasion, on his returning from the gaming table in a dreadful temper, he accused the defendant of inconstancy; she protested her innocence, but nevertheless he nearly strangled the defendant, and inflicted on her several violent blows, and exclaimed, "she was dead, he had murdered her;" that she exhibited articles of the peace against him, *and he was bound over to keep the pence. in 2,000*l.*; that he endeavoured to procure a divorce, but could not succeed, though she did not oppose it; that, although he could see the child whenever he wished it, he had only sent for her twice within the last three years and a half, when she was immediately sent; that she believed his only motive in claiming the child was a wish to give her, Mrs. Dobbyn, pain, and not affection to the child.

Easter Term, 1818. The defendant was examined upon interrogatories, and reported in contempt. By consent sentence was postponed till the next Term. And it was referred to Mr. Taunton to determine in whose custody Philippa Dobbyn should be placed, or remain for the present to

abide his further order. And it was also referred to Mr. Taunton to inquire into all matters in difference between the prosecutor and the defendant, touching the said Philippa Dobbyn, and to determine in whose custody the said Philippa Dobbyn should be permanently placed, and to regulate the access to be had by the prosecutor and defendant to the said Philippa Dobbyn, if he should adjudge it proper that both parents should have such access. And to make such further order respecting her as he should think fit, the prosecutor and defendant undertaking (by the rule) to pay obedience to such orders.

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[*645, n.]

Infant child in custody of the mother, brought up by *habeas corpus* at the father's instance. Ordered that the child remain with the mother; the father's access to be regulated by the Master.

Hilary Term, 1829. Wife and child, daughter of three years old, brought up by *habeas corpus* sued out by the husband; the wife was asked if she was under any restraint; and she was told she was at liberty to go where she pleased; and it was referred to the Master to determine at what time and in what manner, and under what circumstances, the father should have access to the daughter; she in the mean time to remain with the mother.

1836.
Jan. 29.

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REX v. THE LIVERPOOL AND MANCHESTER RAILWAY COMPANY.

(4 Adol. & Ellis, 630—637 ; S. C. 6 N. & M. 186 ; 1 H. & W. 689.)

By the Liverpool and Manchester Railway Act it was provided that the purchase money to be given by the Railway Company for lands, &c., taken, and the compensation they were to make for damage to lands, &c., and for detriment, injury, damage, loss, inconvenience, or prejudice, sustained by owners and occupiers, should be ascertained, in case of disagreement, by a jury, who should assess compensation for the damages to be sustained by any person being owner or occupier of or interested in such lands, &c., for the detriment, &c., which should accrue to him by reason of the making of the railway, or of the execution of the Company's power: such damages to be settled distinctly from the value of the lands. And every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway was intended to pass, not having any greater interest than as tenant at will or lessee for a year, was to give up possession at six months' notice; but, where such tenant was required to give up possession before the expiration of his term or interest, the Company were to make compensation for the value of the unexpired term or interest, to be settled, if necessary, by a jury.

The Company gave notice as above, to a party whose lease had been several times renewed for terms of seven years, and whose landlord, at the time of the last renewal, had declined to renew for fourteen years, but assured the tenant that he would not be turned out at the end of the seven. The tenant afterwards laid out money in improvements. During the seven years the landlord sold his reversion to the Company, and died:

Held, that the tenant had no interest for which the Company were bound to make compensation under the Act.

THE above Company was incorporated by stat. 7 Geo. IV. c. xlix. (local and personal, public), and empowered thereby to make a railway from Liverpool to Manchester, and to take lands for the purposes of the Act. Sect. 45 (1) enacts that all bodies politic, &c., before capacitated to sell, and the owners and occupiers of any lands, tenements, &c., through which the Company's works are intended to be made, "may accept and receive satisfaction for the value of such lands, tenements, and hereditaments, and also compensation for the damages to be sustained in making or completing the said works," and "for and on account of the detriment, injury, damage, loss, inconvenience, or prejudice which may be sustained by such bodies,"

(1) Compare the permissive and compulsory clauses of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).—R. C.

&c., or other persons, in such sums as shall be agreed upon, the amount of satisfaction and compensation to be settled, in case of disagreement, by a jury; such jury to be summoned by the sheriff on warrant from the Company.

Sect. 47 enacts that, in ascertaining the sums to be paid for the purchase of any lands, &c., “the jury shall also ascertain and assess the compensation and satisfaction to be made by the said Company for any damages which shall or may at any time or times hereafter be sustained by any body or bodies,” &c., “or by any person or persons respectively, being owner or owners or occupier or occupiers of or interested in such lands, tenements, or other hereditaments, for or by reason of the severing or dividing the same from other lands,” &c., belonging to such bodies, persons, &c., “and for or on account of the detriment, injury, loss, and damage, or prejudice which shall or may accrue to or be sustained by such body or bodies,” &c., “owner or owners, or occupier or occupiers, or other person or persons interested in such lands, tenements, or other hereditaments, or any of them, by reason of the making, using, repairing, or maintaining the said railway or tramroad, and other works and conveniences belonging thereto, or by reason or means of the execution of any of the powers given to the said Company;” such damages and compensation to be settled separately and distinctly from the value of the lands, &c., to be taken and used as aforesaid.

Sect. 48 enacts that the said juries shall settle, “what shares and proportions of the purchase money or compensation for damages which shall be assessed as aforesaid shall be allowed to any tenant or other person or persons having a particular estate, term, or interest in the premises, for such his, her, or their interest or respective interests therein.” Sect. 55 vests the lands in the Company on payment or legal tender of the purchase money or compensation agreed upon or assessed.

Sect. 56 (1) enacts that every tenant at will, lessee for a year, and other person in possession of lands, &c., through which the railway is intended to pass, not having any greater interest than as tenant at will or lessee for a year, or from year to year, shall

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(1) Compare s. 121 of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18).—R. C.

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deliver up possession to the Company at the expiration of six calendar months next after such notice as is there directed (whether such notice be given with reference to the time when the holding commenced, or not, and whether it be given before or after the time of the purchase by the Company), or at such time as shall be required after the expiration of six calendar months; and, in case of refusal, it shall be lawful for the Company to issue their precept to the sheriff to deliver possession, which he is by the same section required to do.

Sect. 57 is as follows: "Provided also, and be it further enacted, that where any such tenant or lessee shall be required to deliver up the possession of any premises so occupied by him to the said Company, or to any person or persons authorised by them to take possession thereof as aforesaid, before the expiration of the term or interest of such tenant or lessee as aforesaid in the said premises, the said Company shall and they are hereby directed to make or tender unto such tenant or lessee, before they shall issue their precept or precepts to the sheriff to give possession of the lands and premises in the occupation of such tenant or lessee as hereinbefore mentioned, satisfaction or compensation for the value of his unexpired term or interest in the said premises;" which satisfaction, &c., in case of difference, is to be ascertained in the same manner as any other satisfaction or compensation for lands, &c., to be made and assessed under this Act.

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By stat. 2 Will. IV. c. xlvi., local and personal, public, for enabling the Company to make a branch railway, &c., it was enacted that the powers, directions, &c., of the first-mentioned Act, and of subsequent ones relating to the original railway, should be applicable and effectual for carrying the new Act into execution. Certain premises, referred to in the Act as intended to be taken and used, were described in a schedule; and among them were those now in question. The Act received the Royal assent May 23rd, 1832.

In Michaelmas Term last, a rule *nisi* was obtained for a *mandamus* to the Company to issue their warrant for summoning a jury, pursuant to the first-mentioned Act, for the purpose of assessing compensation and satisfaction to William Bathe and

Benjamin Wraith for the detriment, injury, loss, damage and prejudice accruing to, and sustained and to be sustained by them, by reason of their premises situate, &c. (on the line of the branch railway) being required to be taken, and taken, for the purposes of that Act, and of the Act for making a branch railway. The grounds of motion were as follows :

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Wraith, in 1804, took a lease of the premises from Benjamin Bromfield for seven years. At the expiration of the term he took from Bromfield a new lease for seven years of the same property, with some additional premises, at an advanced rent. He carried on business there as a manufacturer of plaster of Paris, till 1816, when he was obliged to discontinue it, and his interest in the premises was sold for 400*l.* to his son and Bathe, who carried on the business there in partnership till 1819. The son then withdrew, and Wraith entered into partnership with Bathe, and continued the business *with him on the same premises till the time of this application. The lease was renewed twice, after 1816, by Bromfield, at the same rent ; the last renewal was for seven years from February 2nd, 1828, by indenture of February 1st, made between Bromfield and Bathe. The last renewal was negotiated by Wraith on behalf of his partner and himself. Bromfield at first agreed to grant a term of fourteen years, and a lease was engrossed accordingly ; but he then objected to granting a lease for more than seven years, at the same time assuring Wraith and his partner that they would not be turned out at the end of the term : and they, confiding in this assurance, took a renewal for seven years. In the same confidence they expended above 300*l.* upon the premises after the renewal ; part of the amount in 1832 and 1834. They had also laid out a considerable sum upon them, from 1816 to 1828. In or about 1833, the Company contracted and agreed with Bromfield for the purchase of his reversion in the premises. On the 19th of August, 1834, the Company gave Bathe notice to deliver up the premises to them at the expiration of six calendar months. Bathe and Wraith, in November, 1834, applied to the Company for compensation, or that a jury might be summoned ; but the Company refused to comply with either demand, inasmuch as the lease would expire on the 2nd of

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February, 1885. Bromfield died in August, 1884, having conveyed his reversionary interest to the Company. Wraith in his affidavit, on which the rule was obtained, stated his belief that, if the Act had not been passed, the premises would not have been sold by Bromfield, and would not have been wanted for any purpose but that of carrying on the business of the *then lessees, or a similar one, and that the lease would have been renewed on advantageous terms.

Wightman in this Term (1) shewed cause :

The parties making this application have probably relied upon the cases in which writs of *mandamus* were granted against *The Hungerford Market Company, Ex parte Farlow* (2), and *Rex v. The Hungerford Market Company, Ex parte Still* (3), and *Ex parte Gosling* (4). But those cases turned upon the construction of a very peculiar clause, section 19, in the Hungerford Market Act, to which the Court felt it necessary to give some operation. In the Acts now before the Court no such clause is found. Sect. 47 of stat. 7 Geo. IV. c. xlix. does not extend so far ; and the interests contemplated in sect. 56 and 57 must be definite legal interests. Bromfield, on whose supposed assurance of a renewal these claimants rely, was dead when the compensation was demanded. They had notice, in May, 1882, by the schedule to stat. 2 Will. IV. c. xlvi., that their premises would probably be required by the Company.

Kelly, contra :

The Court will construe an Act of this kind liberally in favour of the claimants. In *Rex v. Hungerford Market Company, Ex parte Gosling* (4), the probability of the renewal of a lease was held to be a subject of compensation, though there was no covenant for renewal. The nineteenth section of the Act there contained the word "occupiers," and their interest was distinguished from that of termors losing part of *their term. Sect. 56 of the present Act, after mentioning tenants at will and

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(1) January 28th. The case, after being partly heard, stood over to the next day.

(2) 36 R. R. 580 (2 B. & Ad. 341).

(3) 4 B. & Ad. 592.

(4) 4 B. & Ad. 596.

lessees for a year, provides for any "other person in possession." Sect. 48 provides for distributing the purchase money or compensation to the tenant "or other person or persons" having a particular estate or interest. Sect. 45, after speaking of persons capacitated to sell, and owners, adds, "occupiers:" and the words "detriment, injury, damage, loss, inconvenience, or prejudice," are sufficient to cover this claim. Sect. 47, besides owners and occupiers, adds, "interested in such lands, tenements," &c. In order to satisfy all these words, persons having interests not strictly legal must be included.

LORD DENMAN, Ch. J. :

It certainly requires very comprehensive words to include such an interest as this, if interest it be. It is merely a hope of renewal on the old terms, which, if there has been an improvement, were not likely to be granted, where there would have been a competition. This is different from the case of a sale, and also from the case under the Hungerford Market Act, where the words antecedent to "good will" had exhausted the legal interests.

LITTLEDALE, J. :

The words there were extensive enough; but here they are not so.

WILLIAMS, J. :

The words in the forty-fifth section, "detriment, injury," &c. are so placed in the clause as to be of no avail to the argument for the claimants. They shew only what the compensation is to be given for, when the premises are to be the subject of compensation at all: but we must collect from other parts *whether these premises are so; and in my opinion they are not.

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COLERIDGE, J. concurred.

Rule discharged.

NICHOLSON *v.* JOHN REVILL THE YOUNGER.1836.
Jan. 30.

(4 Adol. & Ellis, 675—683; S. C. 6 N. & M. 192; 1 H. & W. 756; 5 L. J. (N. S.) K. B. 129)

[675]

In assumpsit on a promissory note, it was pleaded that, R. owing plaintiff 299*l.*, plaintiff agreed with R., S. R., and defendant, that they should give plaintiff, and he should accept, their joint and several note for 299*l.* as a satisfaction and security for the debt, which was done. It was further pleaded that, the note being due, and the debt unpaid, and plaintiff having sued the three makers, it was agreed that the action should cease, and that the three makers should give their three joint and several notes for 52*l.* 18*s.* 8*d.* at thirteen months, and 110*l.* 13*s.* 4*d.* and 56*l.* 13*s.* 8*d.* at longer periods, as a satisfaction and security for 200*l.* parcel of the debt due from J. R., with interest; and the notes were so given. It was further pleaded that, the first note being due and unpaid, and the second (now sued upon) not yet due, S. R. agreed with the plaintiff to pay, and did pay him, 100*l.* in discharge of S. R.'s liability on the three last-mentioned notes, and plaintiff accepted the same in discharge, and gave up to S. R. the first of the three notes, indorsed upon the note now sued upon a receipt of 47*l.* 1*s.* 4*d.* on account, erased S. R.'s name from this note, and discharged him from further liability thereon. These facts being admitted, and it being answered that the last mentioned transaction with S. R. took place without defendant's knowledge or consent, which was not denied:

Held, that the discharge of S. R. by the plaintiff discharged the defendant (1).

ASSUMPSIT. First count on a note made by defendant, January 1st, 1832, promising to pay plaintiff or his order, 25 months after date, 110*l.* 13*s.* 4*d.* Second count on a note of the same date made by defendant, promising to pay plaintiff or his order, 31 months after date, 56*l.* 13*s.* 8*d.*

Pleas. To the first count, that the note therein mentioned was a note made by defendant, Samuel Revill, and John Revill, defendant's father, and by them delivered to plaintiff, whereby they jointly and severally promised to pay &c.: and that, after the making and delivery thereof, and before the commencement of this suit, to wit, &c., plaintiff, without defendant's knowledge or consent, struck out and erased the name of Samuel Revill on the note, and wholly discharged him from all liability thereon, and from payment of the sum therein mentioned or any part thereof: verification. To the second count, the like plea, and verification.

(1) Following the principle of L. R. 10 Q. B. 406, 44 L. J. Q. B. *Cheetham v. Ward* (1797) 4 R. R. 143, and Bills of Exchange Act, 741. And see note there. See 1882, s. 64.—R. C. also *Simpson v. Henning* (1875)

Replication to the first plea. That, before and at the times after-mentioned, J. R. the father was indebted to plaintiff in 299*l.* on an account stated, whereof defendant at the said times had notice; and thereupon, viz. *March 8th, 1826, in consideration of the premises, it was agreed by and between plaintiff, J. R. the father, Samuel Revill and defendant, that plaintiff should accept, and the three other parties should give, their promissory note bearing date the day last-mentioned, whereby they jointly and severally promised to pay plaintiff or order on demand 299*l.* with interest, as and for a satisfaction and security of and for the said debt so due from J. R. the father to plaintiff: That the note was so given and accepted, in pursuance of the agreement, as and for a satisfaction and security, &c. : That afterwards, the note being payable and unpaid, and the debt still due, and an action on the note pending at the plaintiff's suit against J. R. the father, S. R. and defendant, viz. July 21st, 1832, in consideration of the premises, it was agreed, by and between plaintiff and J. R. the father, S. R. and defendant, that the action should cease, and that plaintiff should accept, and J. R. the father, S. R. and defendant should give their three promissory notes, viz., one promissory note of January 1st, 1832, whereby they jointly or severally promised, 13 months after date, to pay plaintiff or order 52*l.* 18*s.* 8*d.*, the promissory note mentioned in the first count and first plea, and the promissory note mentioned in the second count and second plea, respectively, as and for a satisfaction and security of and for 200*l.*, parcel of the said debt due from J. R. the father to plaintiff, with interest from January 1st, 1832: That the said three notes were, on July 21st, 1832, made and given in pursuance of the agreement as and for a satisfaction and security, &c., and accepted by plaintiff accordingly: That afterwards, and when the time for payment of the first of the said three notes had long elapsed, the money due thereon *not having been paid, and before the day of payment of the note mentioned in the first count and first plea, viz. on January 28th, 1834, the said Samuel Revill proposed to plaintiff to pay him 100*l.* in discharge of his liability on the three last-mentioned notes, which plaintiff agreed to accept, and thereupon, viz. on the day last aforesaid, the said S. R. paid plaintiff 100*l.*

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in discharge &c., and plaintiff accepted the same accordingly; and thereupon plaintiff gave up to S. R. the first of the three last-mentioned notes, and indorsed on the note mentioned in the first count and first plea as follows, viz. "Received on account by Samuel Revill 47l. 1s. 4d.; this sum, with the amount of the first note, make 100l.:" And that, after such payment by S. R., plaintiff struck out the name of S. R. on the note in the first count and first plea mentioned, and erased the same therefrom, and discharged S. R. from any further liability on the last-mentioned note, and from any further payment on account thereof, which said striking out &c. and discharging &c. are the same supposed striking out &c. as in the first plea mentioned. Verification. The replication to the second plea was the same, *mutatis mutandis*; only not stating any indorsement to have been made by plaintiff on the note.

Rejoinder to the replication to the first plea; that the three promissory notes in that replication mentioned were given for securing payment of sums together exceeding 200l., viz. 220l. 5s. 8d., and were so given by J. R. the father, and by S. R. and the defendant as his sureties, and have been held by plaintiff for securing part of the said debt of J. R. the father and interest thereon as in the replication to the first plea mentioned, and for no other consideration or *purpose: and that the proposal of S. R. in that replication mentioned was so made by him, and accepted and acted on by plaintiff, and the name of S. R. struck out from the note in the first count mentioned, and S. R. discharged from liability thereon, without the knowledge, privity, or consent of defendant. Verification. The rejoinder to the replication to the second plea was the same, *mutatis mutandis*.

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Surrejoinder. To the first rejoinder: that, at the time of giving the three promissory notes, therein and in the replication to the first plea mentioned, the money satisfied and secured to plaintiff by the said note of J. R. the father, S. R. and defendant, in the said replication first mentioned, remained long overdue, and the debt due from J. R. the father to plaintiff as in the said replication mentioned remained wholly unsatisfied, and the action in that replication mentioned was pending, and the

agreement therein secondly mentioned had been entered into: and that the existence of the said several circumstances, so in the said replication, and now again in this surrejoinder, above-mentioned, were the consideration and purpose of the said three promissory notes in the said replication and rejoinder above-mentioned being given. Without this, that the said three notes were given by S. R. and the defendant as sureties of or for J. R. the father, and for no other consideration or purpose whatsoever, in manner and form &c. Conclusion to the country. The surrejoinder to the second rejoinder was the same, *mutatis mutandis*.

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Demurrer to each surrejoinder, assigning for cause, that the plaintiff has offered to put in issue a matter not properly issuable; has not denied, or confessed and avoided, the substantial matter in the rejoinder; and *has traversed a negative, and a matter not alleged in the rejoinder. Joinder in demurrer.

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[After argument, the COURT took time for consideration.]

LORD DENMAN, Ch. J. now delivered the judgment of the COURT (1):

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After having stated the declaration and the defence pleaded, his Lordship said: We need not enquire what the effect of a demurrer to this plea would have been, because additional facts are brought to our knowledge by the subsequent pleadings. The replication to the first plea states (his Lordship then stated the replication and subsequent pleadings down to the surrejoinders).

To these surrejoinders the defendant demurs, and has contended that the traverse is immaterial, and that the facts appearing on the record entitle him to our judgment; and we are of that opinion. But we do not proceed on some of the grounds mentioned at the Bar, such as the effect of the plaintiff's alteration of the instrument as making it void, or that the defendant thereby lost his right to contribution from the joint makers of the note; nor on any doctrine as to the relation of

(1) Denman, Ch. J., Littledale, J., and Williams, J.

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principal and surety. We give our judgment merely on the *principle laid down by Lord Chief Justice EYRE in *Cheetham v. Ward* (1), as sanctioned by unquestionable authority, that the debtee's discharge of one joint and several debtor is a discharge of all. For we think it clear that the new agreement made by the plaintiff with Samuel Revill, to receive from him 100*l.* in full payment of one of the three notes and in part payment of the other two, before they became due, accompanied with the erasure of his name from those two notes, and followed by the actual receipt of the 100*l.*, was in law a discharge of Samuel Revill.

This view (2) cannot perhaps be made entirely consistent with all that is said by Lord ELDON in the case *Ex parte Gifford* (3), where his Lordship dismissed a petition to expunge the proof of a surety against the estate of a co-surety. But the principle to which we have adverted was not presented to his mind in its simple form; and the point certainly did not undergo much consideration. For some of the expressions employed would seem to lay it down that a joint debtee might release one of his debtors, and yet, by using some language of reservation in the agreement between himself and such debtor, keep his remedy entire against the others, even without consulting them. If Lord ELDON used any language which could be so interpreted, we must conclude that he either did not guard himself so cautiously as he intended, or that he did not lend that degree of attention to the legal doctrine connected with the case before him, which he was accustomed to afford. We do not find that any other authority clashes with our present judgment, which must be in favour of the defendant.

Judgment for the defendant.

(1) 4 R. R. 741 (1 Bos. & P. 630).

(2) See these observations referred to by PARKE, B. in *Kearsley v. Cole* (1846) 16 M. & W. 128, 136, 16

L. J. Ex. 115, 117; and by WILLES, J. in *Bateson v. Gosling* (1871) L. R. 7 C. P. 9, 11; 41 L. J. C. P. 53, 56. —R. C.

(3) 6 R. R. 53 (6 Ves. 805).

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE KING'S BENCH.)

GEORGE JAMES AND ANOTHER *v.* PLANT (1).

1886.

(4 Adol. & Ellis, 749—766; S. C. 6 N. & M. 282; 6 L. J. (N. S.) Ex. 260.)

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Estates, A. and B., formerly distinct, became vested in coparceners. Before that time, a right of way had been enjoyed from A. over B., and, after the unity of seisin, the way always continued to be used. The parceners, for the purpose of making partition, conveyed to a releasee to uses the messuages, tenements, lands, &c. (of which the estates consisted), and all houses, out-houses, ways, easements, &c., to the said several messuages or tenements, lands, &c., belonging or appertaining, or therewith usually held, used, occupied, or enjoyed: to have and to hold the messuages, &c., called A., with the buildings, lands, &c., thereunto belonging, and their appurtenances, to the releasee to the use of S. in fee; *habendum*, as to estate B., in similar terms with respect to the parcels, to the releasee to his own use in fee, in order that he might become tenant to the *præcipe* in a recovery.

Held, that the deed sufficiently shewed an intention that a right of way, (which way was admitted to have been used up to the time of the deed) from the high road over B. to A. and back, for the convenient use of A., by the occupiers of A., should pass to the uses limited as to A.

That by the word "appurtenances," in the *habendum* as to A., interpreting that clause with reference to the other parts of the deed, the way in question did pass.

And that the releasee to uses, having no estate in A., had not such a seisin of the soil as would extinguish the right of way by unity of seisin.

TRESPASS for breaking and entering certain closes.

Plea, that the closes in which &c. were parcel of a certain farm, lands, and premises called Woodseaves House Farm, mentioned in the after stated indenture, and that, before the making of that indenture, Thomas Smallwood and Maria his wife (in right of Maria), and Elizabeth Hector, were seised respectively in fee each of an undivided moiety of and in Woodseaves House Farm, and also of and in the messuages, tenements, and premises after mentioned to have been bargained, sold, and released to Thomas James, and called respectively Park Hall

(1) See *Kay v. Oxley* (1875) L. R. (1887) 37 Ch. D. 490, 57 L. J. Ch. 10 Q. B. 360; 44 L. J. Q. B. 210; 255. And compare *Worthington v. Barkshire v. Grubb* (1880) 18 Ch. D. (1860) 2 El. & El. 613, 29 L. J. Q. B. 116; *Pearson v. Spencer* (1861) 1 B. & S. 571 (per BLACKBURN, J., p. 581).—R. C.

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and Park House : and, being so seised, afterwards, viz. November 10th, 1812, by indenture of release between Smallwood and his wife of the first part, Elizabeth Hector of the second, Thomas Huxley of the third, and Richard Spearman of the fourth, of the date last mentioned, for the making a partition of the messuages, *lands, &c. after described, and for barring all estates tail, reversions, &c., of and in the messuage or tenement after described, called Woodseaves Farm, and the lands and hereditaments thereunto belonging, and the allotment, &c., also after described, and for conveying and assuring all the said messuages, lands, &c., to the uses and on the trusts after declared, and in consideration of 10s., the said T. S., and Maria his wife, and Elizabeth Hector, did, according to their respective estates, grant, bargain, sell, alien, and release to Huxley (in his possession then being by a bargain and sale, &c.) all that messuage or tenement called by the name of Park Hall, with the outbuildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c., containing &c.; and also all that other messuage or tenement called by the name of Park House, with the buildings and several parcels of land thereunto belonging and then occupied therewith, situate, &c., containing &c.; which two last-mentioned messuages or tenements, lands, &c., were purchased by Brooke Hector of and from Richard Whitworth, Esq., and, on the decease of the said B. H. intestate, descended to the said Maria and Elizabeth his two daughters and co-heiresses; and also all that other messuage or tenement called by the name of Woodseaves House Farm, with the outbuildings and the several parcels of land thereunto belonging, and then occupied therewith, situate, &c., containing &c.; which last-mentioned messuage and premises were purchased from certain persons (in the plea mentioned) by Thomas Adams, and were, by settlement made on the marriage of the said Brooke Hector with Elizabeth his late wife, daughter of the said Thomas Adams, limited, after her decease, and in default of her *male issue by B. H., to the use of all her daughters by B. H. in tail general; and also all that allotment, &c. (an allotment of waste under an Inclosure Act): “And all houses, outhouses, edifices, buildings, barns, stables, cowhouses, yards, gardens, orchards, ways, paths, passages, waters, watercourses, hedges, ditches,

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mounds, fences, trees, woods, underwoods, and the ground and soil thereof, easements, profits, privileges, advantages, emoluments, hereditaments, rights, members, and appurtenances whatsoever, to the said several messuages or tenements, lands and hereditaments hereinbefore described belonging or in anywise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member thereof; and the reversion and reversions, remainder and remainders, &c., and all the estate, right, title, &c., of Thomas Smallwood and Maria his wife, and Elizabeth Hector, and each of them, of, in, to, or out of the said premises, &c.: “to have and to hold the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appurtenances,” to Huxley and his heirs, to the uses and on the trusts after declared: “and to have and to hold the said messuage or tenement called Woodseaves House Farm, with the buildings, lands, and hereditaments thereunto belonging, and the said allotment,” &c. before respectively granted, “and every part and parcel thereof, with their and every of their appurtenances,” to Huxley, his heirs, and assigns, to the use of Huxley, his heirs, and assigns, to the intent that he *might become tenant to the *precipe* in a recovery to be suffered as was after mentioned.

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The plea then stated a covenant in the said indenture by Smallwood, on behalf of himself and his wife, to levy a fine of their moiety in Park Hall and Park House, with the premises thereto belonging, and before mentioned to have been purchased by Brooke Hector, to Spearman and his heirs: and that it was agreed between the parties to the indenture, that a recovery should be suffered of Woodseaves House Farm, with the buildings, &c., and appurtenances thereto belonging, and also of the said allotment, with the appurtenances, in which recovery Spearman should recover against Huxley, and Thomas and Maria Smallwood and Elizabeth Hector should be vouchees: and that the uses of the fine of the said messuages, &c., and premises, before granted, and the uses of the said recovery were declared

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respectively to be, as to "the whole of the said messuages or tenements called Park Hall and Park House, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging," and also the said allotment with its appurtenances, to such use, &c., and for such estate and interest as Smallwood should by deed appoint &c.; and, in default of such appointment, &c., to the use of Smallwood and his assigns during his life; and, from and after the determination of that estate in Smallwood's lifetime, to the use of Spearman, his heirs and assigns, during Smallwood's life, in trust for Smallwood and his assigns; and, from and after the determination of that estate, to the use of Smallwood, his heirs and assigns: and, as to "the said messuage or tenement called Woodseaves House Farm, with the buildings, lands, hereditaments, and appurtenances thereto belonging," to *the use of Elizabeth Hector, her heirs and assigns for ever.

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The plea then stated a recovery suffered of Woodseaves and the allotment, and a fine levied of a moiety of Park Hall and Park House, according to the above indenture.

The plea went on to state, "that, long before and at the time of the making of the said indenture of release, and of the levying of the said fine and suffering the said recovery, the occupiers for the time being of the said messuage and premises called Park Hall had always been used to have and enjoy a certain way from a certain public King's highway in the parish of" &c., "into, through, over, and along the said closes in which &c., towards and unto Park Hall aforesaid, and so back again into, through, over, and along the said closes in which &c., unto and into the said public King's highway, for themselves and their servants, on foot, and with cattle and carts and other carriages, to go, return, pass and repass in and along the said way, every year and at all times," &c. "for the convenient use and occupation of Park Hall aforesaid; and the said way had, before and at the time of the making of the said indenture of release, and of the levying of the said fine and suffering the said recovery, been always held, used, occupied, and enjoyed therewith."

The plea then stated that, after the fine and recovery, by indenture, to which Smallwood, Spearman, and others were

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parties, Spearman and others bargained, sold, and released to Thomas James, in fee, the said tenements and premises, with the appurtenances, called Park Hall, and all houses, outhouses, easements, &c. thereto belonging or therewith held, used, occupied, or enjoyed. And that *Thomas James died seised in fee : whereupon his estate in the tenements and premises descended to William James, his heir-at-law, from whom the present defendant George James deduced title. And the defendant James pleaded that he, as the owner and occupier of Park Hall aforesaid, before and at the said several times when &c., was and still is entitled to such way as last aforesaid ; and he, in virtue of such his alleged title, and the other defendant as his servant, justified the trespasses complained of.

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The plaintiff demurred to this plea, assigning for cause, “ that it does not appear that the said supposed way in the said plea mentioned was in any manner granted or reserved to the said defendant George James or any person under, by, or from whom he claims, or that he hath any claim or title to the same.” The defendants joined in demurrer ; and on argument, in Michaelmas Term, 1833, the Court of King’s Bench gave judgment for the plaintiff (1).

Error was brought on the judgment ; and the case [having been argued, the COURT (2) took time for consideration] .

TINDAL, Ch. J. now delivered the judgment of the COURT :

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This case comes before us upon a writ of error, brought on a judgment of the Court of King’s Bench, given for the plaintiff below, upon a demurrer to the defendants’ plea, that Court having in effect determined, by their judgment, that the right of way, under which the defendants below have justified the trespasses complained of, did not pass under the indenture of release, the fine, and the recovery, set out in the defendants’ plea.

There will be no necessity for us to enter into the discussion of the principles of law, upon which the judgment of the Court below has proceeded ; with respect to which principles there is no difference in opinion *between this Court and the Court of

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(1) *Plant v. James*, 5 B. & Ad. 791. C.B., Parke, Bosanquet, and Vaughan,
(2) *Tindal, Ch. J., Lord Abinger, JJ., and Alderson, B.*

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King's Bench. We all agree that, where there is a unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and that, after such extinguishment, or during such suspension of the right, the way cannot pass as an appurtenant under the ordinary legal sense of that word. We agree also in the principle laid down by the Court of King's Bench, that, in the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject-matter of the conveyance.

But, agreeing thus far with the Court below, we feel ourselves compelled to differ from it in the application of these principles to the present case. For we think the intention of the grantors to pass the way in question to the owner of the Park Hall estate appears from the deed itself, and that there are words contained in that deed sufficient to carry such intention of the parties into effect.

It appears from the recitals in the deed that, at the time of its execution, that is, on the 10th of November, 1812, the Park Hall estate, in respect of which the right of way is claimed, was vested in the two sisters, Maria the wife of Thomas Smallwood, and Elizabeth Hector, as coparceners in fee, claiming by descent from their father Brooke Hector; and that at the same time the Woodseaves House estate, which comprises the land over which the way extends and which came from their *mother, was vested in them, as tenants in common in tail general, under a settlement made upon their mother's marriage with their father Brooke Hector.

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There can be no doubt therefore, as before observed, but that any right of way, which before the unity of seisin of these two properties might have belonged to the Park Hall estate, over the lands of the Woodseaves House Farm, became suspended in law from the moment when such unity of seisin commenced; and that such suspension of the right would continue until the unity of seisin should cease by the determination of the estate tail.

It appears, however, from the averment in the plea, which is admitted by the demurrer to be true, that, long before and at the time of the making of the said indenture, &c., the occupiers for the time being of the Park Hall estate had "always been used to have and enjoy a certain way," therein described, over the closes in which, &c., and back again, "for the convenient use and occupation of Park Hall aforesaid;" and that such way had, before and at the time of the making of the said indenture, &c., "been always held, used, occupied, and enjoyed therewith." And that this was the very same way in dispute between the parties, is evident, as well from the fact that the defendants justify under it, as also because the plaintiff has not new assigned the trespasses as having been committed out of and beyond this way so described in the plea.

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It appears therefore judicially to the Court that the way in question is a way that has always existed for the convenient use and enjoyment of Park Hall, and has always been held and occupied and enjoyed therewith; that is, not only before the unity of seisin of the land and way over it, but since and during such unity of *seisin, and notwithstanding the legal effect of it, and indeed up to the very time of the execution of the deed.

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This being so, the reasonable inference must be that, in a deed making a partition between the two sisters, it was the intention of the contracting parties that each sister should take the whole of the estate allotted to her as her share, in the same plight and condition, as to all its conveniences and means of enjoyment, as it was held and occupied at the time such partition was made; and that no reason can be suggested, *à priori*, for supposing that a way which had been always found useful and convenient for the enjoyment of the Park Hall estate, and which, for that purpose, had been always held and enjoyed by the tenants of Park Hall, and which continued so to be up to the very time of the partition made, should after the partition cease to be held and enjoyed for the same purpose by that sister to whom Park Hall was allotted. Indeed, so strong is that inference, that authorities are not wanting to shew that, where a way has been extinguished by the unity of seisin of two estates, by the partition of the two the way is revived. Thus

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it is laid down as law, in 1 Jenkins's Centuries, Ca. 97, that "a way is extinguished by unity of possession, and is revivable afterwards upon a descent to two daughters, where the land through which, &c. is allotted to one; and the other land to which the way belonged, is allotted to the other sister; and this allotment, without specialty, to have the way anciently used, is sufficient to revive it;" and to the same point is the authority of Bro. Abr., title Extinguishment, 15, with this difference only, that he adds "tamen videtur que est novel chimin."

[*764] But, independently of this general inference of intention, resulting from the object of the parties being *that of effecting a partition, we think the intention of the parties, that the way should pass, is to be inferred more particularly from the frame and texture of the deed itself.

For the grantors convey to Huxley, the grantee, the lands comprised in Park Hall, and the lands comprised in Woodseaves House Farm, and all ways, paths, "passages," &c., "to the said several messuages," lands, and hereditaments "belonging or in any wise appertaining, or therewith usually held, used, occupied, or enjoyed, or accepted," &c., "as part, parcel, or member thereof." Huxley therefore takes, under the latter words, the way in question, which, according to the allegation in the pleadings, was held and enjoyed with Park Hall: and we can assign no object for which this way could have been granted to him, except it was intended to pass it through him with the land itself, upon the several uses which are subsequently declared as to Park Hall.

Upon the first head, therefore, we think the intention of the grantors to pass this way sufficiently appears; and that the only question is, whether there are words in the release sufficient, upon their legal construction, to pass such right of way. Now the deed of release, after describing the premises intended to be conveyed in the terms before adverted to, proceeds in the *habendum* thus: "To hold the said messuages or tenements called Park Hall and Park House, with the buildings, lands, and hereditaments thereunto belonging, thereby before granted and released, and expressed and intended so to be, and every part and parcel thereof, with their and every of their appur-

tenances," unto the said Thomas Huxley and his heirs, to such uses as are therein declared. The deed then contains a covenant, on the part *of Smallwood, that he and his wife would levy a fine of the Park Hall and Park House estate, and that the said fine so to be levied "of the said several messuages or tenements, lands, hereditaments, and premises thereby before granted and released, or expressed or intended so to be," should enure, and that the said Thomas Huxley and his heirs should stand seised of all the same messuages or tenements, lands, hereditaments, and premises, and every of them, and of every part thereof, with the appurtenances, to the several uses, &c. thereafter declared of and concerning the same respectively, (that is to say) as to, for, and concerning the whole of the said messuages and tenements called Park Hall and Park House, with the buildings, lands, hereditaments, and appurtenances thereunto respectively belonging, to the use of such person, &c. And we think that the word "appurtenances," where it occurs in that part of the *habendum* which relates to the Park Hall estate, and, again, where it occurs in the declaration of the uses of the fine, is not confined to that which is in legal strictness an appurtenant, such as an easement, the enjoyment whereof has never been interrupted by unity of possession or extinguished by unity of seisin, but that it will let in and comprehend the right of way which has been "usually held, used, occupied or enjoyed" with the Park Hall and Park House estate, as above expressed in the operative part of the deed itself, that is, the very way which is now in dispute. The deed itself forms a glossary for the word, by which glossary it is to be interpreted. (See the cases to this point well collected in the argument of counsel in the case of *The Marquis of Cholmondeley v. Lord Clinton* (1).)

It has been urged in argument that, even if the word "appurtenances" is capable of receiving a more enlarged meaning from the context, yet the way in and over the lands of the Woodseaves estate did not and could not pass by those general words, for the soil itself of both the estates passed to the same trustee. But to this it appears to us to be a sufficient answer, that, whilst the Woodseaves lands are conveyed to Huxley to the use

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(1) 21 R. R. 419 (2 B. & Ald. 625, 637).

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of him and his heirs, to the intent that he may suffer a common recovery, no estate whatever is conveyed to him in the Park Hall estate, but he is a mere releasee to uses only. And, with respect to such releasee, it is a known doctrine that, since the statute, he takes no interest whatever in the land; that on his account it can neither escheat nor be forfeited; nor is it subject either to dower or curtesy on account of his momentary seisin. And we know of no authority, and without it there is no reason for holding, that such momentary seisin of the land shall operate to extinguish a right of way by unity of seisin.

We therefore think we only construe the deed so as to carry into effect the manifest intention of the parties, when we hold the words of it to be sufficient, when explained by the context, to carry the right of way in dispute to the grantee of the Park Hall and Park House estate; and we think ourselves justified in such construction according to the well known principle. “*benignè faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.*”

On these grounds we give judgment of reversal.

Judgment reversed.

1836.
April 15
[773]

EX PARTE CHAPMAN, ESQUIRE.

(4 Adol. & Ellis, 773—774.)

The Court will not grant a criminal information for calling a magistrate a liar, accusing him of misconduct in reference to his having absented himself from an election of clerk to the magistrates, and threatening a repetition of the same language whenever such magistrate came into the town, unless there appear an intention to provoke a breach of the peace.

SIR JOHN CAMPBELL, Attorney-General, on behalf of John Chapman, Esquire, a magistrate of the borough of Bridgewater, moved for a rule to shew cause why a criminal information should not issue against John William Trevor and his son. The son had held the place of clerk to the magistrates of the borough, up to February last, when the other magistrates, in Mr. Chapman's absence, elected another person to fill the office. Trevor, the father, subsequently complained in violent terms to

Mr. Chapman of the transaction, and repeatedly called him a liar, and, in the presence of several persons, said that he was unfit to be a magistrate, and added that he should hear the same every time he came into the town. It was also sworn that Trevor, the son, had stated that Mr. Chapman had absented himself from the election on purpose.

Ex parte
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(LORD DENMAN, Ch. J.: How could you frame an indictment on these facts?)

They would support a charge that the two conspired to defame Mr. Chapman's character as a magistrate. There is at all events evidence for a jury, that the words were spoken of him in his character of magistrate; and it may, therefore, be laid as a misdemeanor, independently of the conspiracy. It certainly is not alleged that there was an intent to provoke a breach of the peace.

LORD DENMAN, Ch. J.:

I think it would not be proper to grant this rule. I do not see my way clearly enough *to treat this as a misdemeanor. I recollect a case where a rule was granted for words spoken against a magistrate, which was afterwards discharged, because they appeared to be spoken with reference, not to his conduct as a magistrate, but to his voting as an elector to some office. In the present case I at first thought the tendency of the words had been to provoke a breach of the peace.

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PATTERSON and COLERIDGE, JJ. (1) concurred.

Rule refused.

HOPKINS v. JAMES CROWE.

(4 Adol. & Ellis, 774—778; S. C. 2 H. & W. 21; 5 L. J. (N. S.) K. B. 147; S. C. at Nisi Prius, 7 Car. & P. 373.)

1836.
April 16.

[774]

A hired driver of a cabriolet, having brought home the horse apparently much ill-used by him, the owner's son (in the owner's absence) called in a policeman, and told him that the driver had ill-used the horse. The policeman said that, if the complainant charged the driver

(1) Littledale, J. was absent on the Western circuit.

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with cruelty to the horse, he would take him into custody; the complainant said, "I do;" and the policeman apprehended the driver, under stat. 5 & 6 Will. IV. c. 59, s. 9(1).

Held, that the complainant must be considered, not as a party giving information to the officer in consequence of which he was arrested, but as a principal causing the arrest to be made; and that he was not entitled to notice of action, which the statute requires to be given to persons sued for anything done in pursuance of it.

TRESPASS for assaulting and seizing plaintiff, compelling him to go to a station-house of the police, and imprisoning him there. Plea, Not guilty. On the trial before Lord Denman, Ch. J. at the sittings in Middlesex after last Term, it appeared that the defendant's father, Robert Crowe, a proprietor of cabriolets, had employed the plaintiff as a driver: that the plaintiff one night, at a late hour, having been out with a cabriolet and horse belonging to Robert Crowe, brought the horse home much distressed, and apparently ill-used: that the defendant, who was sitting up (in the absence of his father), called in a policeman and said to him, **"Here is a man who has brought me home no money, and has ill-used my horse; I shall give him in charge:"* that the policeman said he could have nothing to do with the money, but that, if the defendant charged the plaintiff with cruelty to the horse, he would take him into custody: that the defendant said, "I do," and the policeman thereupon took the plaintiff to the station-house, where the defendant charged him before the inspector with ill-using the horse. *Sir F. Pollock*, for the defendant, submitted that, if he had a *bonâ fide* intention to act under the statute 5 & 6 Will. IV. c. 59, sects. 2 and 9, he was entitled to notice of action under sect. 19(2): and, further, that the acts done by

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(1) Repealed by the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 1. But see s. 13 of this Act.—R. C.

(2) Stat. 5 & 6 Will. IV. c. 59, s. 2, imposes penalties (to be recovered on conviction before a justice) upon persons wantonly and cruelly ill-treating any horse, &c.

Sect. 9 is as follows: "And, for the more easy and effectual apprehension of all offenders against this

Act, be it further enacted, That when and so often as any of the said offences shall happen it shall and may be lawful to or for any constable or other peace officer, or for the owner of any such cattle or animal, upon view thereof, or upon the information of any other person (who shall declare his, her, or their name or names and place or places of abode to the said constable or other peace officer), to seize and

him were justified by sect. 9. The LORD CHIEF JUSTICE held that the defendant, not being the owner of the horse, was not within the protection of the Act, or entitled to notice, if he had directed the constable to apprehend the plaintiff. His Lordship refused to put the question of **bona fides* to the jury, but told them that, if the defendant had not directed the constable to apprehend, but had merely given him information, he was entitled to a verdict. The jury found for the plaintiff, damages 5*l.*

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C.
CROWE.

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Sir F. Pollock now moved, by permission, for a rule to shew cause why a nonsuit should not be entered. The defendant might reasonably suppose that he was acting under the statute; and he was therefore entitled to notice. If he had been the owner, he would himself have been warranted in apprehending the plaintiff. But any person may give information to an officer for the purpose of causing an offender against the Act to be apprehended; and the defendant, though not present at the ill-usage, was justified, by what he saw, in making a charge against the plaintiff. If, in so doing, he did not use sufficient caution and particularity, he was still acting in pursuance of the statute, and entitled to the protection of notice, even if he was not altogether justified. *Pratt v. Hillman* (1), where the defendant, having proceeded erroneously under the Building Act, 14 Geo. III. c. 78, was held entitled to notice under that Act, is a similar case in principle.

secure by the authority of this Act, and forthwith and without any other authority or warrant to convey any such offender before any one justice of the peace within whose jurisdiction the offence shall have been committed, to be dealt with according to law."

Sect. 19 * enacts, that in all actions "for any thing done in pursuance or under the authority of

this Act," fourteen days' notice in writing of such action and the cause thereof, shall be given to the defendant, who may plead the general issue and give this Act and any other matter in evidence; and, if notice of such action shall not have been given in manner aforesaid, the jury shall find a verdict for the defendant.

(1) 4 B. & C. 269.

* See now the Public Authorities Protection Act, 1893 (36 & 37 Vict. c. 61), s. 1. *Querre*, as to the effect

of the words there inserted—"or intended execution."—R. C.

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(PATTESON, J.: The persons justified by sect. 9 of this Act are a constable or the owner, acting upon view or information given as is there pointed out. It is not under the statute that persons are enabled to give information; any one might do that, at common law.)

At least, if a party give it, but without sufficient particularity, he is not, therefore, liable to an action for false imprisonment.

(PATTESON, J.: Your argument would come this, that the action ought to have been for maliciously charging the plaintiff.)

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The *question is, whether the defendant really intended to act under the statute. The word "information" must be taken in the popular, not the legal, sense.

PATTESON, J. (1) :

This case is very clear. It was proved that the defendant not only told the officer something which he professed to know, but took upon himself to direct the officer to apprehend the plaintiff. He made the officer his servant for that purpose; and he is, therefore, liable in trespass. Then is he entitled to the protection of the statute? Section 9 of stat. 5 & 6 Will. IV. c. 59, extends only to an officer, or the owner of an animal ill-treated, acting upon view or information. The defendant was neither officer nor owner. It is said, that he was, nevertheless, entitled to the protection of notice, because he acted *bonâ fide*. But to what extent would such a rule go? For example, by a late Act as to game, persons trespassing on lands may, in certain cases, be arrested by the occupier of the land or his servant, or other persons having certain authorities; and, in actions for anything done in pursuance of that Act, notice of action is required, and other restrictions are imposed (2). According to the argument used to-day, a person not being owner or occupier of the lands, nor otherwise authorised, but thinking himself entitled to act, might arrest a trespasser, and, if sued, insist upon the

(1) Littledale, J. was absent.

(2) 1 & 2 Will. IV. c. 32, ss. 31, 47. [See now the Public Authorities

Protection Act, 1893 (56 & 57 Vict. c. 61), which repeals s. 47 of 1 & 2 Will. IV. c. 32.]

protections of the statute. In *Pratt v. Hillman* (1) the defendant was the party described by section 42 of the Building Act, 14 Geo. III. c. 78, and having the right to proceed under that clause, though he had taken a wrong step; he was consequently entitled to *notice under section 100 of the same Act. The defendant here is not the person described by stat. 5 & 6 Will. IV. c. 59, s. 9.

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COLERIDGE, J. :

It is not necessary to infringe upon the case of *Pratt v. Hillman* (1), or upon many others which shew that, where a person has actually proceeded under a statute giving the kind of protection here claimed, he is entitled to the benefit of such statute, if he *bonâ fide* intended to act in pursuance of it. Here, the defendant is not brought within the Act. If he had been a mere informer, sued as having given a defective or overcharged information, he might have been protected, according to the argument used to-day: but he was a principal, making an arrest by the hand of the police officer.

LORD DENMAN, Ch. J. :

I think that a verdict contrary to that given would have been wrong. The words used by the defendant were, in effect, a direction to the officer to arrest; and the defendant was not the description of person authorised by the statute to arrest, or entitled to protection according to the cases which have been referred to. The ninth section applies only to an owner or peace-officer himself seeing the nuisance of cruelty committed, or having information of it from another person, as directed by the statute. But the information meant is not the kind of communication made in this case: it is to be a substitute for view. To say, "I charge this person with cruelty to the horse," is giving no information.

Rule refused.

(1) 4 B. & C. 269.

1836.
April 18.

[786]

WISE v. CHARLTON (1).

(4 Adol. & Ellis, 786—791; S. C. 6 N. & M. 364; 2 H. & W. 49.)

An instrument which, in other respects, was a promissory note, and had been properly stamped as such before making, contained in the body of it a memorandum that the maker had deposited certain title deeds with the payee as a collateral security. After it was made, it was stamped with a proper mortgage stamp on payment of the penalty.

Held, that this was an assignable promissory note under stat. 3 & 4 Ann. c. 9, s. 1 (2), and that it might be sued on by an indorsee, though the mortgage stamp was put on after the making, and though there was no assignment stamp.

If an instrument containing a mortgage be also a promissory note, it may still be stamped with a mortgage stamp, after the execution, provided it has a promissory note stamp on it at the time it is executed.

ASSUMPSIT by the indorsee of a promissory note against the maker. The declaration (which was filed before the operation of the rules Hil. 4 Will. IV.) described the note as made 16th of April, 1823, in favour of John Goodwin Johnson, or order, payable on demand, with lawful interest, for value received; and indorsed by Johnson to the plaintiff; and it averred a demand on 2nd of September, 1833. Plea, *non assumpsit*. On the trial before Lord Abinger, C. B., at the last Derby Assizes, the note was produced; and it was in the following form:

“ £120.

16th of April, 1823.

[*787]

“ On demand I promise to pay to Mr. John Goodwin Johnson or order the sum of one hundred and twenty *pounds, with lawful interest for the same for value received; and I have deposited in his hands title deeds to lands purchased from the devisees of William Toplis, as a collateral security for the same.

“ W. CHARLTON.”

To this note there was a proper promissory note stamp at the time it was signed by the defendant, and a stamp of 2*l*. (the proper stamp for a legal or equitable mortgage of the amount of the note) had been imposed on payment of a penalty, subsequently to the commencement of the action. It appeared that the payee Johnson, and the plaintiff Wise, were partners as attorneys; that the note had been prepared by Wise, and the

(1) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 83 (3).—R. C.

(2) Repealed by the Bills of Exchange Act, 1882. But see sections 31—38 and 89 of this Act.—R. C.

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deeds mentioned in it left with him; but that, several years before the indorsement of the note to Wise, he, Wise, had delivered back the deeds to the defendant. It was objected, on the part of the defendant, that the latter stamp was unavailable, as having been made by the commissioners without authority; that, even supposing the commissioners had authority to stamp a promissory note after it was made, yet an assignment stamp was also requisite to enable an assignee to sue upon this instrument, and that it was an agreement and equitable mortgage, and not a promissory note assignable under stat. 3 & 4 Ann. c. 9, s. 1. The LORD CHIEF BARON received the note in evidence, but reserved leave to move to enter a nonsuit. The case went to the jury on some disputed facts respecting the consideration, and the plaintiff had a verdict.

Whitehurst now moved for a rule to shew cause why a nonsuit should not be entered, or a new trial had *for misdirection. First, the commissioners had no authority to affix the 2*l.* mortgage stamp after the note was made, if the instrument is to be considered a promissory note. By stat. 23 Geo. III. c. 49, s. 14, and stat. 31 Geo. III. c. 25, s. 19, the paper upon which promissory notes are drawn must be stamped before the note is made. And by the latter statute the commissioners are expressly prohibited from stamping any paper &c. upon which a promissory note shall be written; and a note, not duly stamped, is not available in law or equity. Stat. 37 Geo. III. c. 136, s. 1, enables the commissioners to stamp certain instruments after they are executed, upon the payment of a penalty; but that statute expressly excepts the paper upon which promissory notes may be written. The commissioners, therefore, had no authority to affix any stamp upon this paper upon which a promissory note had before been written. And sect. 5 of the Act does not apply to a note which, when made, had not any stamp of the proper amount: *Green v. Davies* (1), *Butts v. Swann* (2). The regulations of former statutes on this subject are made applicable to the present Stamp Act, 55 Geo. III. c. 184, by sect. 8 of that Act. But, secondly, assuming that the commissioners had

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(1) 28 B. R. 230 (4 B. & C. 235).

(2) 2 Brod. & B. 78.

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[*789]

authority to affix the 2*l.* mortgage stamp after the note was made, and that that stamp would have been sufficient (stat. 55 Geo. III. c. 184, sched. part 1, Mortgage) if the payee of the note himself had sued upon the note, yet, as the security has been assigned over, an additional stamp of 1*l.* 15*s.* was necessary (stat. 3 Geo. IV. c. 117, s. 2); for the assignment of the note is an assignment of the equitable mortgage *contained in the note. Thirdly, this was not an assignable promissory note, under stat. 3 & 4 Ann. c. 9, s. 1. It was an agreement, by which the maker undertook to pay Johnson the sum mentioned in the note, and Johnson undertook, on such payment, to deliver back the deeds. While the instrument was in the hands of the payee, the maker was entitled to require the re-delivery of the deeds upon the payment of the money, and was not bound to pay if that re-delivery were refused. It never could have been the intention of the parties that, Johnson should have a right to hand over the defendant's title deeds, and that they should pass from hand to hand; nor could Johnson transfer the note without the deeds; for the defendant had a right to insist upon the delivery of the deeds from the person who had the note. It can make no difference that the deeds had been delivered up to the defendant before the indorsement; for a note which is not transferable at the time it is made, is not rendered so by any subsequent event (1). The present plaintiff cannot be in a better situation than Johnson. An agreement to pay money on re-delivery of deeds cannot constitute a promissory note under the statute of Anne, any more than a conditional order to pay would be a bill of exchange within the custom of merchants: the two securities are placed on the same footing by the statute.

(LITLEDALE, J.: In the case of a mortgage, or a deposit, the debt may be sued for by the mortgagee without delivering up the deeds.

COLERIDGE, J.: How can a collateral security fetter the principal security?)

[*790]

The securities are given by the same instrument; and the effect of the one is *therefore controlled by the other. (He then

(1) *Hill v. Halford*, 5 B. R. 632 (2 Bos. & P. 413).

commented upon the evidence, and upon the remarks made upon it by the LORD CHIEF BARON to the jury.)

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LORD DENMAN, Ch. J. :

With respect to the admissibility of the note in evidence, if it be a promissory note the stamp is right. And there is nothing to qualify its character. There is only a memorandum added of something else: but that is not imported into the main agreement.

LITLEDALE, J. :

This is an absolute promissory note; and there is no qualification. There is a memorandum, that deeds are deposited as a collateral security; but, as a note, the instrument is quite valid without a mortgage stamp. Besides, the restriction, which prohibits stamping a promissory note after it is made, applies only to the promissory note stamp: the fact that an instrument, which, in the character of a mortgage, may be stamped after it is made, contains also a promissory note, amounts to nothing. The meaning of the Legislature was, merely, that parties should not take their chance on a promissory note by delaying the stamping till they wanted to produce it in evidence as a promissory note: but that does not prevent a mortgage, which happens also to be a promissory note, from having a mortgage stamp put on after it is made. *Butts v. Swann* (1) was a very different case. There the agreement stamp, put on after the instrument was made, was held insufficient, because the order to pay the money was so incorporated with the instrument *that the latter could not be used without calling in aid its operation as a promissory note. We need not enter into the question, whether it be necessary that there should be an assignment stamp. I do not know that an assignee of this instrument could at law avail himself of it, against the maker, as a mortgage.

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PATTESON, J. :

This is not the less a promissory note, from its being also an agreement of another kind. The cases cited by *Mr. Whitehurst*

(1) 2 Brod. & B. 78.

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apply merely where there has been no promissory note stamp before the making.

COLERIDGE, J. :

If this be a promissory note, no difficulty remains. It is not the less a promissory note, from a memorandum of another kind being added, importing that a collateral security has also been given.

The COURT took time for consideration as to the other grounds of motion ; and afterwards (May 5th) the rule was

Refused.

1836.
April 19.
[792]

BARTLETT v. ANN PURNELL.

(4 Adol. & Ellis, 792—794 ; S. C. 6 N. & M. 299 ; 2 H. & W. 19 ; 5 L. J. (N. S.) K. B. 169.)

Whether an auctioneer be the agent of both purchaser and seller depends upon the facts of the particular case.

Therefore, where a party, to whom money was due from the owner of goods sold by auction, agreed with the owner, before the auction, that the goods which he might purchase should be set against the debt, and became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the printed conditions of sale which specified that purchasers should pay a part of the price at the time of the sale, and the rest on delivery.

ASSUMPSIT for cattle, and goods, sold and delivered, and on an account stated. Plea, *non assumpsit*. On the trial before Bolland, B. at the last Somersetshire Assizes, it appeared that the cattle and goods were put up to sale by public auction, under printed conditions of sale, according to which purchasers were to pay a certain per centage of the price at the sale, and the rest on delivery : that the defendant became the purchaser of goods to the amount of 145*l.*, and that her name was written down as such, at the time of the auction, by the auctioneer. The plaintiff was the executor of the late husband of the defendant, who claimed a legacy of 200*l.* under the will. The goods sold had been the property of the husband. On cross examination of the plaintiff's witnesses, it appeared that, a short time before the sale, the plaintiff told the defendant that she might purchase

goods to any amount under 200*l.*, and that it should go towards the legacy of 200*l.* This evidence was objected to, on the part of the plaintiff, as tending to vary the printed conditions of sale; but the learned Judge received it, and told the jury that, if they believed that by the contract between the parties the legacy was to be set against the price of the goods, the claim was answered. The jury found for the defendant; and the learned Judge gave the plaintiff leave to move to enter a verdict for the plaintiff for 145*l.*

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v.
PURNELL.

Erle now moved accordingly :

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The auctioneer was the agent of the defendant; and, by his writing down her name, she became a purchaser under the printed conditions. In *Gunnis v. Erhart* (1) it was held that declarations, made by the auctioneer at the time of the sale, could not be received for the purpose of varying the printed conditions. *Powell v. Edmunds* (2) and *Shelton v. Livius* (3) are to the same effect.

(COLERIDGE, J. : The defendant said that she did not purchase at the sale.

PATTESON, J. : Your authorities relate merely to alterations made in the conditions of sale, affecting all purchases at the sale : the question here is, whether the purchase was under the sale by auction at all.)

That cannot be disputed, after the plaintiff's name has been taken down as highest bidder. The defendant, in order to prevent this from having the usual legal effect, should have told the auctioneer, at the time of the sale, that she was not purchasing under the conditions.

LORD DENMAN, Ch. J. :

The jury must be taken to have found that the bargain related to the goods purchased at the sale, subject to the opinion of the Court whether the bargain could be given in evidence. I do not

(1) 2 R. R. 769 (1 H. Bl. 289).
See *Jones v. Edney*, 13 R. R. 803
(3 Camp. 285).

(2) 11 R. R. 316 (12 East, 6).
(3) 37 R. B. 746 (2 Cr. & J. 411;
2 Tyr. 420)

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PURNELL.

see why it should not, as it took place before the auction. The objection made is, that the auctioneer took down the defendant's name at the sale. No doubt an auctioneer may be agent for both parties: but here the bargain was, that what the defendant should buy was to be set off against the legacy. We do not overrule the former cases; but we consider them inapplicable. [*794] The auctioneer is not, *ex vi termini*, agent for both *parties: that depends upon the facts of the particular case.

LITLEDALE, J.:

Goods are put up to auction; and a person to whom 200*l.* is due agrees to purchase, on the terms of the price being set against the debt, and goes to the auction in pursuance of this special agreement. It is said that the auctioneer is her agent: but it does not appear that he was so here. He put her name down; but the auctioneer must do so; he gives a bond to the commissioners of excise conditioned for his accounting for the duty. Then the sale to the defendant was exempted from the general conditions of the sale; and she was entitled therefore to set off the legacy.

PATTESON, J.:

We do not infringe upon former cases by refusing to grant this rule. When a party purchases under conditions of sale, he cannot give evidence to vary the contract. But here, properly speaking, the defendant does not so purchase. The bargain is made, subject to the original contract as to the payment.

COLERIDGE, J.:

The point suggested by *Mr. Erle* does not arise upon the facts. The question is, whether the defendant bought at all at this auction. If she did, there must be a verdict against her, as the record stands: but the jury were right in saying that she did not. The conversation was good evidence of that: she was to take the goods; but they were to be reckoned at the highest price bidden for them. The auctioneer wrote the name down; but that was merely the necessary way of fixing such price.

Rule refused.

LAY *v.* LAWSON.

(4 Adol. & Ellis, 795—798.)

1836.
April 19.

[795]

Declaration complained that defendant published an advertisement in a newspaper, stating that a *capias* had issued against plaintiff, and that it had been impracticable to take him, and offering a reward for such information to be given to the sheriff's officer as would enable him to take plaintiff; innuendo that plaintiff was in indigent circumstances, incapable of paying the debt, and keeping out of the way to avoid being served with process. Plea, that a *capias* had been issued, indorsed for bail, and delivered to the sheriff; that defendant had kept out of the way to avoid being taken; that the sheriff's officer had been unable to take him; and that defendant had published the advertisement, at the request of the party suing out the writ, within four calendar months of the date of the writ, to enable the sheriff and his officer to arrest. Held, a justification.

CASE for libel. The first count stated that the plaintiff was the keeper of an hotel, and that the defendant printed and published in the *Times* newspaper a certain false &c., of and concerning the plaintiff, as follows: "Mr. Joseph Lay" (the innuendoes identifying this name with the plaintiff throughout). "Whereas a writ of *capias* dated the 15th day of June last has been issued against Mr. Joseph Lay, late of No. 31, Edgware Road, hotel-keeper, but it has hitherto been impracticable to effect a caption, a reward of 5*l.* will be paid to any person who will give such information to Mr. Selby, sheriff's officer, of No. 31, Chancery Lane, as shall enable him to take the said Joseph Lay. The reward will only be paid on the caption being made." The libel was then further set out, describing the person of the plaintiff, and the following innuendo was added; "thereby then meaning that the plaintiff was in bad and indigent circumstances, and incapable of paying his just debts, and that he was keeping out of the way in order to avoid being served with process for debt." The second count stated the libel to be in the form of and as an advertisement.

Pleas, 1. Not guilty. 2. That heretofore, and before the time &c., to wit, &c., one Henry Cleeve, according to the form &c., had sued and prosecuted, out *of the Court of Common Pleas in the county of Westminster, a certain writ of our Lord the King called a writ of *capias* against the plaintiff, directed to the Sheriff of Middlesex, and dated &c., by which writ our

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said Lord the King commanded the said sheriff &c. (setting out the *capias*); which said writ afterwards, and before the delivery thereof to the said sheriff to be executed as is hereinafter mentioned, to wit on &c., was marked and indorsed for bail for 80*l*. by affidavit, according to the form &c., and which writ so indorsed, afterwards, to wit on &c., was delivered to Alexander Raphael, Esq., and John Illidge, Esq., who then and from thence until and at the time &c. were sheriff of the said county of Middlesex, in due form of law to be executed; that afterwards, and before &c., to wit, on the day and year last aforesaid, and from thence continually afterward until the times of the committing &c., the plaintiff hid and concealed himself, and kept out of the way, in order to avoid being taken and arrested by the sheriff; and thereby the plaintiff did, for and during all that time, hinder and prevent the said sheriff from taking and arresting him upon and by virtue of the said writ at the suit of the said H. C. for the cause aforesaid, although the said A. R. and J. I., as such sheriff, did during that time use and employ all necessary means &c. in that behalf; that the writ of *capias* in this plea mentioned, and the writ of *capias* in the said supposed libels respectively mentioned, are respectively the same writ and not other &c. And that, the plaintiff remaining and continuing so concealed as aforesaid, and the said sheriff being and remaining wholly unable to find out, or take, or arrest him the plaintiff under the said writ as aforesaid, the *defendant, at the request of George Stephen, the attorney of and for the said Henry Cleeve in that behalf, and in order to enable the said sheriff and Philip Selby, then being bailiff of the said sheriff in that behalf, and the same person as is named and described as Mr. Selby in the said supposed libels, to take and arrest the said plaintiff under and by virtue of the said writ, did, afterwards and within four calendar months from the date of the said writ, including the day of such date, to wit at the said several times when &c., print and publish &c., as he lawfully &c. Verification. Replication, *de injuriâ*, and issue thereon.

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On the trial before Lord Denman, Ch. J. at the Middlesex sittings after Hilary Term last, a verdict was found for the plaintiff on the first issue, and for the defendant on the second.

Thesiger now moved (1) for a rule to shew cause why judgment should not be entered for the plaintiff *non obstante veredicto* :

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The second plea shews no justification. On the trial, the defendant's counsel cited *Delany v. Jones* (2), which was an action for a libel contained in an advertisement, and where Lord ELLENBOROUGH is reported to have said, "That though that which is spoken or written may be injurious to the character of the party, yet if done *bonâ fide*, as with a view of investigating a fact, which the party making it is interested in, it is not libellous" (3). But the LORD *CHIEF JUSTICE, on the trial of this cause, doubted the law laid down in that case; and said that he was not prepared to hold that *bona fides* was the only question, or that the right contended for existed, except for the purposes of public justice; and that, if that were so, every private transaction might be publicly inquired into by means of a newspaper.

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LORD DENMAN, Ch. J. :

I do not know that I meant to say that the right existed, even in the case of a public charge; nor do I know that that is necessary for Lord ELLENBOROUGH's view. The libel in the case cited was inferential only. I have great doubt whether, there, the interest which the wife had in the inquiry could justify the offering a reward in a newspaper.

LITTLEDALE, J. :

And this is a reward for the furtherance of a civil suit only.

The COURT at first granted the rule; but afterwards (April 21), the COURT said that they felt doubtful whether it should be granted, intimating a distinction between justifying on account of the cause of publication, and justifying by averring the truth

(1) Before Lord Denman, Ch. J., Littledale, Patteson, and Coleridge, JJ.

(2) 4 Esp. 191.

(3) The question in that case was, whether proof of the facts negatived

the malice, as there was only a plea of not guilty. See the judgment of HOLROYD, J. in *Fairman v. Ives*, 24 R. R. App. 516 (5 B. & Ald. 645, 646).

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of all the facts stated: and in the same Term (May 5), his Lordship said that the Court thought the second plea contained a defence, and that, as the whole of it was proved, there must be no rule.

Rule refused.

JONES v. REYNOLDS.

1836.
April 20.
[805]

(4 Adol. & Ellis, 805—809; S. C. 6 N. & M. 441; at N. P. 7 C. & P. 335.)

A. agreed with B. to take a lease of B.'s iron ore at N. for forty years, at a certain rent, engaging to work the several veins of ironstone, limestone, &c., in certain stipulated proportions; and B. agreed to grant such lease:

Held, that by this agreement B. took, not a mere license, but a right constituting a hereditament within stat. 11 Geo. II. c. 19, s. 14, in respect of which A. might sue him for use and occupation.

ASSUMPSIT for use and occupation of land, and veins of ironstone, limestone, ore, and minerals, with the appurtenances. Pleas, the general issue, and Statute of Limitations. On the trial before Coleridge, J. at the last Spring Assizes for Glamorganshire, the plaintiff proved the following agreement, drawn up in the form of letters between the plaintiff and defendant:

“SWANSEA, 21st February, 1825.

“DEAR SIR,

“I shall be happy to take a lease of your iron ore at Newton at the royalty of 1s. per ton; and I will engage to work the several veins of ironstone, limestone, ore, and manganese in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores of South Wales, which I believe to be about 40 per cent.; the term to be forty years from the 24th of June next, and the sleeping rent 150*l.* per annum; the lease to be voidable on the part of the lessee by giving six months' notice, and paying one year's rent as a fine, if given within the first two years, and 500*l.* as a fine, if the lease be terminated by the lessee at any subsequent time; the relative proportions of the iron ores in weight, to be *worked together, to be ascertained by a competent person. I am,” &c.

“J. REYNOLDS.

“TO CALVERT RICHARD JONES, Esquire.”

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“ I agree to the terms contained in your letter, copied on the other side, and shall be ready to grant a lease conformable thereto from myself and all other proper parties whenever you require me.

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“ CALVERT RICHARD JONES.

“ JOHN REYNOLDS, Esquire.”

The plaintiff also put in the following notes, written upon the respective parts of the former agreement by the plaintiff and defendant :

“ Memorandum, 4th April.—I propose to take a lease of the minerals above described, lying in the lands of which you are joint proprietor with Colonel Knight, on the terms above mentioned for your exclusive property.

“ JOHN REYNOLDS.”

“ I agree to let to Mr. Reynolds a lease of my joint property on the same terms I have granted him a lease of my independent property, commencing at the same time, and paying the same sleeping rent, and the same royalty per ton.

“ C. R. JONES.”

Evidence was then given to shew an actual use and occupation. COLERIDGE, J. expressed a doubt whether the interest vested in the defendant, by these agreements, was of such a nature that an action of use and occupation could be grounded upon it ; and he referred to *Doe d. Hanley v. Wood* (1). Leave was given to *move to enter a nonsuit on this point, and the plaintiff had a verdict.

[*807]

John Evans, in this Term, moved accordingly (2) :

Nothing was granted, by this agreement, that could be the subject of an action for use and occupation. The defendant had merely a licence to take minerals, not a grant of the subsoil. He could not have maintained ejectment : *Doe d. Hanley v. Wood* (1). As was observed there the agreement, instead of

(1) 21 R. R. 469 (2 B. & Ald. 724).

(2) April 16th. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ. He also moved for a new trial, on the ground that the evidence of

use and occupation was insufficient, and on account of misdirection ; but it is unnecessary to notice these points further.

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granting all the ores, metals, or minerals that were then existing within the land, grants only such parts of them as should be found within the limits, upon exercise of the power given by the agreement to search for and get the ore; the grantee had no estate or property in the land itself, or in any part of the ore ungot. "That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it." It makes no difference whether the chattel be in the land or upon it: if the grant had been of 500 tons of paving stones lying on the land, no action for use and occupation would have lain for either the close or the stones. This is the same case.

(LORD DENMAN, Ch. J.: The action is given by stat. 11 Geo. II. c. 19, s. 14, in respect of "lands, tenements, or hereditaments.")

The right in question comes within none of those terms. It is merely a right to go upon land and fetch away a personal chattel.

[*808] (LORD *DENMAN, Ch. J.: The agreement here is expressly to grant a lease.)

The lease, if granted, would have been only equivalent to the licence in *Doe d. Hanley v. Wood* (1). The defendant would have only so much of the ore as he could work out, the rest remaining the property of the grantor.

(PATTESON, J.: The same might be said as to the lease of an open mine.)

Ejectment lies for an open mine; but that has buildings and other works, which may properly be the subject of such an action (2). Here nothing of that kind was granted.

(LORD DENMAN, Ch. J.: The defendant must have had the occupation of some land for the purposes of this grant.)

The same argument might have been used in *Doe d. Hanley v. Wood* (1).

(1) 21 R. R. 469 (2 B. & Ald. 724). *Alderson*, 1 M. & W. 210; Tyr. &

(2) See *Doe d. Earl of Fulmouth v. Gr.* 543.

(PATTESON, J.: The landlord here is in the situation of the owner of a mine granting the whole pit. He excludes himself.)

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Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The first point raised on the motion for a new trial was, whether the right to take minerals can be the subject-matter of use and occupation. If it may, having been expressly demised, though not by deed, the action is maintainable within the statute 11 Geo. II. c. 19. The doubt which occurred to my brother COLERIDGE on the trial arose from *Doe d. Hanley v. Wood* (1), where this Court thought ejectment would not lie for the premises there sued for, relying on various reasons for that opinion. One of these was, that the terms of the indenture did not amount to a *grant of anything for which ejectment lies, but merely to a permission to search and dig for ore. But it does not seem to follow that that permission actually demised and actually exercised would not be a hereditament enjoyed by the lessee; a hereditament being (in Lord Coke's well known words, Co. Litt. 6a) "whatsoever may be inherited," "be it corporeal or incorporeal, real, or personal, or mixed;" and the statute gives this form of action for every hereditament enjoyed.

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The evidence of use and occupation appears to us not only sufficient, but unusually strong.

Rule refused.

LEWIS v. LADY PARKER (2).

(4 Adol. & Ellis, 838—840; S. C. 6 N. & M. 294; 5 L. J. (N. S.) K. B. 170.)

Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill was an accommodation bill, indorsed to plaintiff's indorser for the purpose of its being discounted for defendant's use; that it was indorsed to plaintiff in fraud of defendant, and that plaintiff took the

1836.
April 21.

[838]

(1) 21 R. B. 469 (2 B. & Ald. 724). (45 & 46 Vict. c. 61), s. 36 (4).

(2) See Bills of Exchange Act, 1882 —R. C.

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bill, by such indorsement, after it was due. Replication, that the bill was indorsed to plaintiff before it became due, he not knowing the premises, without this, that plaintiff took it after it was due. Issue thereon:

Held, that, at the trial, it lay on the defendant to begin, by proving that the bill was due when indorsed.

ASSUMPSIT against defendant as acceptor of a bill of exchange, drawn by Miles, payable to his order, and indorsed by him to Elkins, who indorsed to plaintiff. Also on an account stated. Plea, that Miles drew, and defendant accepted, the bill for the accommodation of defendant, and that Miles might get it discounted and thereby raise money for her use, and without any value or consideration given by Miles for her acceptance; that Miles indorsed to Elkins, without having received any consideration, and for the purpose aforesaid; that Elkins received the bill for the purpose of discounting it, but did not do so, nor did he pay defendant or Miles any money on account of the bill, or otherwise give defendant or Miles any value or consideration for the same, and, on the contrary, the said Elkins, having notice of all the premises, indorsed the bill to plaintiff in fraud of defendant: and, further, that plaintiff took the bill by indorsement from Elkins after it became due, viz. on &c. Verification. There were two other pleas, not material to the point decided.

[*839]

Replication, that Elkins indorsed the bill to plaintiff before it became due, plaintiff not knowing the premises *in the said plea mentioned; without this, that plaintiff took the bill by indorsement from Elkins, after it had become due. Conclusion to the country. *Similiter*. On the trial before Williams, J., at the sittings in Middlesex during this Term, it became a question whether, upon these pleadings, the plaintiff was bound, in the first instance, to shew that the bill was indorsed before it was due, or the defendant to shew that it was indorsed after having become due. The learned Judge held that the onus lay on the defendant; and, no evidence being offered on her part, the plaintiff had a verdict.

Barstow now moved for a new trial on the ground of misdirection. * * *

LORD DENMAN, Ch. J. :

No case in point has been cited; there must therefore be no rule.

LITLEDALE, PATTESON, and COLERIDGE, JJ. concurred.

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[840]

Rule refused.

MORRIS v. DIXON.

(4 Adol. & Ellis, 845—849; S. C. 6 N. & M. 438; 2 H. & W. 57; 5 L. J. (N. S.) K. B. 155.)

1836.
April 25.
[845]

Under Lord Tenterden's Act, 9 Geo. IV. c. 14, s. 8, the following memorandum, "I acknowledge to owe M. 36l., which I agree to pay him as soon as my circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the Statute of Limitations, the debt itself being proved by other evidence.

ASSUMPSIT for money lent, and on account stated. Pleas,
1. The general issue. 2. That defendant did not promise within six years. Issues were joined on both. The particular of demand was for cash lent, principally in 1824. On the trial before Vaughan, J. at the Chester Summer Assizes, 1834, some evidence was given as to the contracting of the debt; and it appeared that the last advance made by the plaintiff to the defendant was in August, 1826. The only evidence of an acknowledgment by the defendant within six years before the commencement of the action was the following memorandum given by him to the plaintiff:

"CHESTER, June 30th, 1832.

"I acknowledge to owe Mr. James Morris of Bolton the sum of 36l. which I agree to pay him as soon as my circumstances will permit me so to do.

"JOHN DIXON."

Evidence was given to shew the defendant's ability to pay at the time when the action was brought. For the defendant, it was objected that this paper ought to have had an agreement stamp, as an agreement, or as a note payable on a contingency and not to bearer or order, within the first head (1) of exemptions

(1) Omitted (probably as superfluous) in the schedule to Stamp Act, 1891 (54 & 55 Vict. c. 39).—R. C.

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in stat. 55 Geo. III. c. 184, sched. part 1, tit. Promissory Note. The learned Judge gave leave to move to enter a nonsuit on this point; and the plaintiff had a verdict for 86l. *John Jerris* in the next Term moved according to the *leave reserved; and he cited *Smith v. Nightingale* (1), and (comparing the instrument to a *cognovit*) *Ames v. Hill* (2) and *Reardon v. Swaby* (3). A rule *nisi* was granted.

Cottingham and Courling now shewed cause:

No stamp was necessary. This was not an agreement, but a mere acknowledgment, and therefore admissible in evidence without a stamp: *Fisher v. Leslie* (4), *Israel v. Israel* (5), *Mullett v. Huchison* (6), *Langdon v. Wilson* (7). It contains no promise but such as the law would imply from the acknowledgment.

(LITTLEDALE, J.: The promise here is not that which the law would imply; it is to pay when the party is able. It renders proof of ability necessary on the plaintiff's part.

PATTESON, J.: Ought not you to have declared specially, on a qualified promise to pay?)

The judgment of the COURT in *Tanner v. Smart* (8) seems to intimate that that would be the proper form; but this point was not taken at the trial. The plaintiff here is no party to the instrument; it does not bind him to wait for his money. There is not the mutuality which is necessary to an agreement. In *Green v. Gray* (9) a *cognovit*, containing a promise by the defendant to bring no writ of error, &c., and to take no advantage of the *cognovit* having been given before declaration, was held not to require a stamp, there being no mutual agreement. In *Lees v. Whitcomb* (10) a written undertaking by a servant to remain with her mistress to learn a trade was held not to be a binding agreement within the Statute of Frauds, because it contained no *engagement on the mistress's part. By sect. 8 of stat. 9 Geo. IV. c. 14 (for rendering a written

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(1) 20 R. R. 694 (2 Stark. 375).

(2) 2 Bos. & P. 150.

(3) 4 East, 188.

(4) 1 Esp. 426.

(5) 10 R. R. 737 (1 Camp. 499).

(6) 7 B. & C. 639.

(7) 7 B. & C. 640.

(8) 30 R. R. 461 (6 B. & C. 603).

(9) 1 Dowl. P. C. 350.

(10) 30 R. R. 539 (5 Bing. 34).

memorandum necessary to the validity of certain promises) it is enacted "That no memorandum or other writing made necessary by this Act shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps." This was a memorandum made necessary by the Act, sect. 1, to take the debt in question out of the Statute of Limitations.

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J. Jervis, contra :

The Statute of Limitations had not attached when this paper was given. There is no proof that it was given to prevent the operation of the statute; it may have been an original promise, and so not within Lord Tenterden's Act, 9 Geo. IV. c. 14. And, if it was executed for the purpose of barring the statute, it may be assumed that the parties were stating an account together, and that, by consent, a writing in the words here used was signed in order that the statute might not run. Then it is an agreement. Or the case may be put thus: leaving out the words, "as soon as my circumstances will permit me to do so," this is a promissory note: with the addition of those words, it is a promise within the Stamp Act. The object of Lord Tenterden's Act was to exclude loose verbal expressions which had formerly been relied upon as barring the statute, providing, at the same time, that parties should not be subjected to a new burden of stamp duty. It does not follow that, if that is put into writing which before the statute would have required a stamp, the stamp shall no longer be requisite. In *Williamson v. Bennett* (1) an instrument signed by the defendants, *acknowledging that they had received of the plaintiffs 200*l.* in three drafts payable to the defendants at certain periods, which they promised to pay to the plaintiffs with interest, was held to be a special agreement; yet the reasons against that construction were very like those which occur in the present case.

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(LITTLEDALE, J.: The clause exempting from stamp duty seems nugatory, unless the Act was meant to apply where words of agreement were used; because in other cases, even independently of the Act, no stamp would be requisite.)

(1) 2 Camp. 417.

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Perhaps the clause was inserted from excess of caution. According to the argument now used, any agreement for payment of a debt might be exempted from stamp duty, on the suggestion that it was intended to bar the Statute of Limitations.

LORD DENMAN, Ch. J. :

I thought, at first, that there had been no evidence in the case respecting the debt besides this document, which certainly is an agreement, and, under other circumstances, would require a stamp. But there was other evidence of the debt. This evidence, therefore, comes within the eighth section, which enacts, that no memorandum or other writing "made necessary by this Act" shall be deemed an agreement within any of the Stamp Acts. The Act points out no particular form of memorandum or writing as necessary; but I think it cannot be said that the instrument in question is not a writing of that quality which the statute makes necessary.

LITLEDALE, J. :

[*849] The undertaking here is in a qualified form; but still it is the promise which is relied upon for the purpose of taking the case out of the *limitation. It is, therefore, within the exemption of stat. 9 Geo. IV. c. 14, s. 8.

PATTESON, J. concurred.

COLERIDGE, J. :

This was an instrument made necessary by the Act 9 Geo. IV. c. 14, for barring the Statute of Limitations: and it was used for no other purpose. If there had been no other evidence of the original debt, I should have thought that it was used to prove that; but, there being evidence of the original debt, independent of this, I think that it was used under the statute, and is exempted by it from stamp duty.

Rule discharged.

DON NUNO ALVARES PEREIRA DE MELLO,
DUKE DE CADAVAL, *v.* THOMAS COLLINS (1).

(4 Adol. & Ellis, 858—868; S. C. 6 N. & M. 324; 2 H. & W. 54; 5 L. J. (N. S.) K. B. 171.)

1836.
April 27.

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Plaintiff being a foreigner, ignorant of the English language, was arrested at Falmouth soon after his first arrival there from abroad, by defendant, for 10,000*l.* Defendant and plaintiff then signed an agreement, by which, in consideration of 500*l.* paid by plaintiff to defendant, plaintiff was to be discharged, and not to be again arrested; and, plaintiff was to put in bail in twelve days; the 500*l.* was to be "as a payment in part of the writ"; and both parties were to abide the event of the action; the agreement containing no provision for refunding the money if the action should fail. Plaintiff paid the 500*l.* and was released. No bail was put in; and the writ was afterwards set aside for irregularity. Plaintiff then sued defendant for the 500*l.* as money had and received; and the jury found that defendant knew that he had no claim upon plaintiff:

Held, that the action lay, the payment having been made under the compulsion of colourable legal process.

ASSUMPSIT for money had and received, and on an account stated. Plea, *Non assumpsit*. On the trial before Lord Denman, Ch. J., in London, February, 1835, it appeared that the plaintiff was a Portuguese nobleman, who had been a member of the Portuguese Government under Don Miguel. In July, 1834, the plaintiff arrived at Falmouth, with his family, from Portugal. Soon after his arrival, he received a letter from the defendant, dated 26th of July, 1834, stating that he had claims on the Government of Don Miguel to the amount of 16,200*l.*, for services performed and pay due, as asserted; but making no claim on the plaintiff individually. The plaintiff took no notice of this letter. On the 5th of August he was arrested at the suit of the defendant, on a writ for 16,200*l.* against the plaintiff and Manuel Viscount de Santarem. The affidavit was for 10,000*l.* and upwards for work and labour. The plaintiff, who did not understand English, applied to the Portuguese Vice-Consul at Falmouth, and had an interview, in his presence, with the defendant, his brother, and an attorney, who attended on behalf of the defendant: and, after some

(1) Compare *Moore v. Fulham Vestry* '95, 1 Q. B. 399; 64 L. J. Q. B. 226, C. A.—R. C.

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negotiation, the following memorandum was drawn up and signed :

“ We, the undersigned, agree to the following conditions :

“ First, his Excellency the Duke of Cadaval pays 500*l.* in lawful money of Great Britain to Thomas Collins, as a payment in part of the writ issued in London for 16,200*l.*, and the remainder his Excellency to give bail immediately : to run the usual course of an action in the Court of King’s Bench : both of us the undersigned to abide by the result : the said 500*l.* to be paid at nine o’clock to morrow morning, for which Mr. Lake the consul is responsible.

“ FALMOUTH, 5th August, 1834.

“ DUQUE DE CADAVAL.

“ THOMAS COLLINS.”

The plaintiff was then released ; and, on the 6th of August, the following agreement was signed by the parties :

“ An agreement made and entered into, this 6th day of August, 1834, between Thomas Collins, of Platt Terrace, in the county of Middlesex, Esquire, of the one part, and his Excellency the Duke de Cadaval, at present residing at Falmouth, in the county of Cornwall, of the other part. Whereas the said Thomas Collins did lately cause a writ of *capias* to be issued out of his Majesty’s Court of King’s Bench at Westminster against the said Duke de Cadaval and one Manuel Viscount de Santarem, at the suit of him the said Thomas Collins, for the sum of 16,200*l.*, and whereas the said Duke de Cadaval was, on the 5th day of the said month of August, at Falmouth aforesaid, arrested and taken into custody by virtue of a warrant granted on the said writ of *capias* by the sheriff of Cornwall aforesaid, and whereas (1) the said Duke de Cadaval, not being at *present prepared to give the required bail to the said sheriff of Cornwall : and it is hereby declared and agreed by and between the said Thomas Collins and the said Duke de Cadaval that, in consideration of the sum of 500*l.* of lawful British money to the said Thomas Collins in hand paid by the said Duke de Cadaval, at or upon the execution of these presents, the receipt whereof he doth hereby

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(1) *Sic.*

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acknowledge, he, the said Thomas Collins, doth hereby consent and agree that he, the said Duke de Cadaval, shall be forthwith discharged from his said arrest, and shall not be taken or deemed liable to be taken again into custody by virtue of the aforesaid warrant or otherwise, except in execution; and the said Duke de Cadaval doth for himself, his executors and administrators, covenant, promise, and agree to and with the said Thomas Collins, his executors and administrators, that he will, within twelve days from the date hereof, give bail to the action, according to the form of the statute in such case provided, being in accordance with the tenor of an agreement entered into between the said parties, bearing date the 5th day of the said month of August (which agreement has been this day destroyed, but is to be held in full force and vigour by these presents) as follows, that is to say: "We, the undersigned, &c. [here the agreement of the 5th of August was set out.]

"In witness whereof the said parties have hereunto set their hands, the day and year first above written.

"DUQUE DE CADAVAL.

"THOMAS COLLINS."

The plaintiff, at the time of the execution of this agreement, paid 500*l.* to the defendant. The writ was set aside for irregularity by a Judge at Chambers, on *the 30th of August, 1834. A rule *nisi* for setting aside the Judge's order was obtained by the defendant in this Court, but discharged in Michaelmas Term, 1834; and no steps had since been taken in that action by the defendant against the plaintiff. No evidence was given, at the trial of the present cause, of any debt due from the plaintiff to the defendant; and it was proved that the latter had taken the benefit of the Insolvent Act in 1833, and that his schedule, though of a date later than the greater part of the claims set up by him in his first letter to the plaintiff, made no mention of any such claims. It was objected, for the defendant, that the money had been paid by the plaintiff voluntarily, and under an agreement between the parties, and with full knowledge of the facts, and could not, therefore, be recovered back in this action. The LORD CHIEF JUSTICE directed the jury to find for the defendant, if they thought that he believed himself entitled to sue the

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plaintiff in the first action, but otherwise for the plaintiff. The jury found a verdict for the plaintiff, and stated it as their opinion that the defendant knew that he had no claim upon the plaintiff. In Easter Term, 1835, *Platt* obtained a rule to shew cause why the verdict should not be set aside. and a nonsuit entered, or a new trial had.

Sir John Campbell, Attorney-General, *Kelly* and *Alexander*, who were to have shewn cause, were stopped by the Court.

Platt and *Butt* in support of the rule :

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The money no longer belongs to the plaintiff. It is not pretended that the plaintiff, when he entered into the agreement, *was ignorant of the facts. Therefore, if the money was paid as part of the debt claimed, it cannot be recovered back. On the other hand, if it was paid simply until bail should be put in, and as a consideration for the delay, and to abide the event of the suit, the plaintiff, not having put in bail, has not performed his part of the agreement, and cannot claim the money back. Even assuming that he was to receive back the money on putting in bail, he cannot recover till he has performed this, as was done in *M'Neil v. Perchard* (1). The payment was voluntary ; for legal process, even when founded on a claim which cannot be supported, does not constitute that sort of compulsion which avoids a contract. The reason is that the law, which creates the pressure, supplies the defence. This is shewn by *Marriot v. Hampton* (2), *Knibbs v. Hall* (3), and *Brown v. M'Kinally* (4).

(PATTESON, J. : In *Fulham v. Down* (5) Lord KENYON qualifies the doctrine ; he says, “ unless to redeem, or preserve your person or goods.”)

The principle upon which all these cases have been decided is, that the party who disputes the claim must do so by resisting the action in the first instance ; and that there must be some end to litigation. On this principle, if the plaintiff had paid the

(1) 1 Esp. 263.

(2) 4 R. R. 439 (7 T. R. 269).

(3) 1 Esp. 84.

(4) 5 R. R. 739 (1 Esp. 279).

(5) 6 Esp. 26, n.

whole sum claimed, he could not now recover it. *Hamlet v. Richardson* (1) is to the same effect, though the marginal note there introduces the exception of the case of fraud on the part of the person obtaining the money. No fraud, however, seems to have been in question, in the case itself. The case of *Cobden v. Kendrick* (2) is there questioned by TINDAL, Ch. J., and *he refers to the judgment of HOLROYD, J. in *Milnes v. Duncan* (3), which supports the principle now contended for. The same principle was acted on in *Bilbie v. Lumley* (4) and *Brisbane v. Dacres* (5). In *Snowdon v. Davis* (6) a bailiff, by threat of a distress for a sum for which his warrant did not authorise him to distrain, obtained that sum, and afterwards obtained another sum from the same party by distraining upon him under another warrant, which authorised him only to distrain on a different person; and it was held that the party paying might recover back both sums. There the distresses were wrongful throughout; upon which ground that case differs from the present, where the agreement was made by a party under an arrest upon a warrant against that party, and the money paid by the party under such agreement. An action for money had and received has been held to be given where no other remedy lay, as in *Hills v. Street* (7); but here the plaintiff, if entitled at all, may recover the sum by way of damages in an action for a malicious arrest.

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LORD DENMAN, Ch. J. :

It is asserted that the principle of decision in *Marriot v. Hampton* (8), has not been adhered to in this case. But that case does not warrant the argument drawn from it. It does not decide that money obtained under the compulsion of legal process can never be recovered back; but only that, after the defence in an action has failed, and money has been recovered in the action, it cannot be recovered back in *another action. This is the ground upon which the decision is put by Lord KENYON. He says, "After a recovery by process of law"—not

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(1) 35 R. R. 630 (9 Bing. 644).

(6) 1 Taunt. 359.

(2) 2 R. R. 424 (4 T. R. 431, n.).

(7) 5 Bing. 37. See judgment of

(3) 30 R. R. 493 (6 B. & C. 679).

BEST, Ch. J. p. 41.

(4) 6 R. R. 479 (2 East, 469).

(8) 4 R. R. 439 (7 T. R. 269).

(5) 14 R. R. 718 (5 Taunt. 143).

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extortion—"there must be an end of litigation." And GROSE, J. says, "It would tend to encourage the grossest negligence if we were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence." The question there arose, not upon an extortion by legal process, but upon the want of means of defence in a previous action, which means a party ought to have when such action is brought. On the other hand, I certainly felt that there might arise, in this case, an inconvenience from our allowing the plaintiff's claim, since there may be another action for a malicious arrest. After the judgment in this case, there will nevertheless be no bar to that action. We must, however, see whether there be anything to defeat the plaintiff's right here, if the money be still his. For *Mr. Platt* has put the question in its true form: is it still the plaintiff's money? How is it shewn not to be so? Why, by striving to give effect to a fraud. That is the finding of the jury: the arrest was fraudulent; and the money was parted with under the arrest, to get rid of the pressure. This case differs from all which have been cited as being otherwise decided: in none of those was the *bona fides* negatived, not even in *Marriot v. Hampton* (1): for, in default of evidence to the contrary, the party there might have believed the debt to be due. But here the jury find that the defendant did know that he had no claim. The property in the money, therefore, never passed from the plaintiff, who parted *with it only to relieve himself from the hardship and inconvenience of a fraudulent arrest.

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LITTLEDALE, J.:

The case of *Marriot v. Hampton* (1) was different from the present. There the plaintiff in the original action claimed a debt, which the defendant asserted that he had paid, but he could not produce the receipt; and, finding he could not defend, he paid the money and gave a *cognovit* for the costs. Afterwards he found the receipt; and sued, in order to recover back what he had paid. But, as the money had been originally recovered by legal proceedings, it was held that he could not recover it back as

(1) 4 R. R. 439 (7 T. R. 269).

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money had and received. That was the ground on which Lord KENYON and GROSE, J. proceeded. They considered that an action did not lie to recover back that which had once been recovered under a legal decision. But here there was no such recovery. The plaintiff was arrested; and the jury find that the arrest was merely colourable: and the money was paid for time to get bail. The arrest must have been merely colourable, since the debt was not inserted in the defendant's schedule. I admit the difficulty which arises from the liability of the defendant to an action for a malicious arrest: no doubt such an action would lie; for, as Collins knew that there was no debt, there is distinct malice. Still we cannot prevent the plaintiff from recovering back his money as money had and received.

PATTESON, J.:

I think this verdict was right. I put the matter entirely upon the special circumstances of *the case. I admit, in general, that money paid under compulsion of law cannot be recovered back as money had and received. And, further, where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back. But here there is no *bona fides*, and on that I ground my opinion. When a man sues to recover back money paid under compulsion of law, it lies upon him to shew that there was fraud. Has the plaintiff shewn that here? The jury find that the arrest was fraudulent, in consequence, I suppose, of the debt not appearing in the schedule; for, if such a debt existed, the defendant was bound to insert it in the schedule, under the Act of Parliament; and the omission of it would have been a misdemeanor severely punishable. The jury, therefore, concluded that the defendant knew that the debt did not exist, and that he used the process colourably. To say that money obtained by such extortion cannot be recovered back, would be monstrous. Then the terms of the agreement form a very strong circumstance. The defendant, having a man in custody for a debt for which he knew that he had no claim, is to get the 500*l.*, whether he recover in the action or not; for there is no provision for the defendant refunding the money in case of his failure. Now suppose the plaintiff had put

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in bail to the sheriff, instead of entering into this agreement, what would the consequence have been? On application to my brother ALDERSON the writ was cancelled, though perhaps on a paltry objection; but the result would have been, in the case supposed, that nothing would have got into the pocket of the defendant. It would be a scandal to the law if this money could not be recovered back.

[867] COLERIDGE, J. :

I quite agree. Although the decisions have gone as far as they can go, yet I will not attempt to disturb them: and they are quite consistent with the decision which we are now giving. It is clear that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear too that, if there be a *bonâ fide* legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation. That is the substance of the decisions. But no case has decided that, when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law. If, indeed, the property were changed, it would follow that the plaintiff must fail; but the defendant's counsel assumed that. I rely on the position which is laid down in 1 Selwyn's *Nisi Prius*, 89 (1), "If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received." For this, *Astley v. Reynolds* (2) is cited, in which the circumstances of compulsion were much less strong than in the present case. My opinion, therefore, is founded upon the particular circumstances of the case. When it is said that we are not to look to the degree of hardship, so as to depart from the legal principle, I agree; but here the particular circumstances make the law of the case. Here is a foreigner, at a great distance from his friends, at a great distance from London, ignorant of the law of England

(1) *Assumpsit* II. 8th ed. 1831. 729; *Shaw v. Woodcock*, 31 R. R.

(2) 2 Str. 915. And see *Morgan* 158 (7 B. & C. 73).
v. Palmer, 26 R. R. 537 (2 B. & C.

(though I do *not rely upon that), charged with owing a very large sum. Then, first, is not the payment compulsory? Next, is there *bona fides*? According to the finding of the jury, the defendant commits perjury, and uses legal process colourably to enforce an unjust demand. I should have been sorry to find that our hands were tied in such a case.

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[*868]

Rule discharged.

GOODMAN v. HARVEY AND OTHERS (1).

(4 Adol. & Ellis, 870—877; S. C. 6 N. & M. 372.)

1836.
April 28.

In giving notice of non-payment to the drawer of a foreign bill, resident abroad, it is sufficient to inform him that the bill has been protested, without sending a copy of the protest.

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In an action by the indorsee of a bill who has given value, if his title be disputed on the ground that his indorser obtained the discount of the bill in fraud of the right owner, the question for the jury is, whether the indorsee acted with good faith in taking the bill. The question whether or not he was guilty of gross negligence is improper. Gross negligence may be evidence of *mala fides*, but is not equivalent to it.

ASSUMPSIT on a bill of exchange drawn by defendants, September 1st, 1832, at Limerick, upon Gould, Dowie, & Co. (London), for 262*l.* 1*s.* 1*d.*, value in freight per *Cicero*, payable at four months to John Scott or order, indorsed by Scott to David Levy, and by D. Levy to plaintiff. The first count alleged non-acceptance; the second, non-payment. Plea (before the new rules), *Non assumpsit*. On the trial before Lord Denman, Ch. J., at the sittings in London, after Hilary Term, 1835, the following facts appeared. The bill was given by the defendants, merchants at Limerick, to Scott, a ship-owner, for a balance of freight. Scott gave *it to Hudson, a ship's captain (who gave no value, and whose name did not appear on the bill), to get it discounted. Hudson delivered the bill for that purpose to David Levy, who caused it to be presented for acceptance on September 20th. The drawees refused acceptance, in

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(1) Observe that, so far as relates to the title of the indorsee who has taken the bill with notice of dishonour, the case is overridden by s. 36 (5) of the Bills of Exchange

Act, 1882. Upon the distinction between negligence and want of good faith the decision is confirmed by s. 90 of the Act.—R. C.

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consequence of having received from the defendants a notice, sent to the latter by a solicitor, warning them not to pay any money to Scott, or to any other person on his account, as the party giving the notice was about forthwith to sue out a commission of bankrupt against him, on the petition of certain persons named in the notice (1). The drawees gave this communication (the receipt of which was proved at the trial) as their reason for not accepting. The bill was noted for non-acceptance, and protested. No notice of the non-acceptance was given to the defendants. Levy returned the bill to Hudson, who, in the latter part of October, carried it back to Scott. Scott, who had by that time been arrested for debt, gave the bill to Hudson again, in order that he might once more endeavour to raise money by discounting it; and Hudson undertook to do so. Hudson again placed the bill in the hands of Levy, and he got it discounted by the plaintiff, who paid about 260*l.* upon it. Levy never remitted the proceeds, but, as was represented at the trial, retained them in fraud of Scott; and no value was ever given for the bill by either Levy or Hudson. When the bill became due, the plaintiff presented it for payment, which Gould, Dowie, & Co. refused, although they had funds, the right to the proceeds being contested. They were *furnished with funds a day or two before the bill became due, but had not funds at the time of the non-acceptance. The bill was protested for non-payment; and notice of the non-payment was sent to the defendants by letter, stating that the bill had been protested as last mentioned, but not inclosing a copy of the protest. For the defendants it was objected, first, that the letter ought to have contained a copy of the protest, which objection the LORD CHIEF JUSTICE overruled; and, secondly, that the plaintiff, in taking the bill from Levy with the notarial marks upon it, had been guilty of gross negligence, and therefore took the bill with all its vices, and could have no better right to recover upon it than Levy himself, who clearly would have had none. The LORD CHIEF JUSTICE was of this opinion, and observed that the plaintiff had received the bill with a death-wound apparent on it; and he proposed to the plaintiff's

(1) The commission did afterwards issue, on a fiat dated January 15th, 1833, and this action was understood to be defended by Scott's assignees.

counsel either a nonsuit, or that the case should go to the jury on the question whether or not the plaintiff had been guilty of gross negligence. The jury, in answer to a question from the LORD CHIEF JUSTICE, said that, in their opinion, the notary's marks on the bill were sufficient notice to an indorsee of non-acceptance. A nonsuit was then taken; and in the next Term *Erle* moved for a new trial, on the ground that the above ruling against the plaintiff was incorrect; that the bill had been lawfully sent into the market by Scott, while not yet due; and that the plaintiff, who had taken it before maturity, and given value for it, had a right to recover the amount, notwithstanding any defect in the title of an intermediate party. A rule *nisi* was granted.

GOODMAN
HARVEY.

Sir John Campbell, Attorney-General, and *Mellor*, now shewed cause. * * *

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Erle, *contra*. * * *

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LORD DENMAN, Ch. J.:

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The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, where the party has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title. The evidence in this case as to the notarial marks could only weigh as rendering it less likely that the bill should *have been taken in perfect good faith. The rule must be absolute.

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LITLEDALE, PATTESON, and COLERIDGE, JJ. concurred.

Rule absolute.

1836.
April 30.
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 [884]

WANSBROUGH AND ANOTHER v. MATON.

(4 Adol. & Ellis, 884—889; S. C. 6 N. & M. 367; 2 H. & W. 37; 5 L. J. (N. S.) K. B. 150.)

A tenant is entitled, at the expiration of his term, to remove a wooden barn which he has erected on a foundation of brick and stone, the foundation being let into the ground, but the barn resting upon it by weight alone.

He may maintain trover for such a barn, against a party converting it.

If the reversioner, having refused, while off the premises, to allow the tenant to take away the barn, afterwards, while a third party is in possession of the land, come on the land and prevent the tenant from entering to take the barn away, this is a conversion by the reversioner.

TROVER for two barns, 1,000 planks of wood, 1,000 rafters, 1,000 joists, and for iron, stones, bricks, &c. First plea, Not guilty; second plea, that plaintiff was not lawfully possessed, &c. Issue on both pleas. On the trial before Gurney, B., at the Salisbury Easter Assizes, 1835, it appeared that the plaintiffs held some land as tenants to the defendant for a term of years determinable on lives. On the expiration of the last life, the plaintiffs quitted possession, and the defendants demised the land to a new tenant, who entered. When the plaintiffs quitted, they left on the land a barn (called a stavel barn) which they had erected, and for which the action was brought. It consisted of wood, resting on, but not fastened by mortar or otherwise to, the caps of blocks of stone (called stavels or staddels) fixed into the ground or let into brickwork, the brickwork being built on and let into the ground in those parts where the ground was lowest, for the purpose of making an even foundation for the barn to rest upon. The wooden barn could be taken away without injury to the rest. It is usual, in the part of the country where the barn stood, for tenants, who had built such barns, to remove them on quitting, or to have them valued to the incoming tenants. The plaintiffs, after the new tenant had entered, demanded the barn of the defendant, off the premises: the defendant said that they should not have it till they had agreed with him as to another matter in dispute: and they afterwards *sent men to bring it away; but the defendant, being then on the premises, ordered the men to leave the ground, and locked the gates after them. Upon this evidence the defendant's

[*885]

counsel applied for a nonsuit, on the grounds, first, that the barn was a fixture, for which trover would not lie; and, secondly, that no conversion was proved. The learned Judge refused to nonsuit, but reserved liberty to move to enter a nonsuit on both points.

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In Easter Term, 1835 (April 23rd) (1), *Merevether*, Serjt. moved accordingly :

There was no conversion. If the plaintiffs chose to leave any moveable chattel on the land, they had no right afterwards to enter for the purpose of taking it away. The defendant was not the person in occupation. And this was no fixture.

The COURT refused the rule on the point of the conversion, but granted it on the other point.

[After argument, upon shewing cause:]

LORD DENMAN, Ch. J. :

[888]

Questions as to fixtures generally arise between the *primâ facie* right of the landlord on the one hand, and exceptions in favour of trade or of tenants on the other. Any general rule is liable to exception. But the first question must be, whether the erection be a part of the freehold. If it be not united to the freehold, we cannot say that it is a part of it; and here it is not so united, and therefore not a fixture. Were we to hold otherwise, we should over-rule the decision in *Rex v. Otley* (2), where such a building was held to be removeable, and no part of the tenement.

LITLEDALE, J. :

The barn consists of nothing but the timber, and is not attached to the stone or brickwork. Perhaps the tenant might not have been entitled to dig into the ground for the purpose of making these foundations, and might be liable in damages for so doing. But, having so done, he places the barn on the stone-caps, not fixing any thing to the freehold. Therefore, in removing

(1) Before Lord Denman, Ch. J., (2) 35 R. B. 258 (1 B. & Ad. Little-
dale, Patteson, and Coleridge, 161).
JJ.

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the barn, he does not disturb the freehold. A tenant may require barns of different kinds; he might take away this building, and substitute, for instance, a *fowl house, keeping always the same foundation in order to insure a level surface. Suppose holes were made in the wooden part, or grooves constructed, so as to fix the barn on to the foundation, I do not know that the barn, if so fixed, might not be removed, since it could be done without injuring the freehold. But that is not necessary to decide; for here there is nothing of the kind, the barn being kept in its place merely by weight. The foundation must remain: if that be injured, the landlord may maintain an action.

PATTESON, J. :

I cannot distinguish this case from *Rex v. Otley* (1). It was decided there that the wooden mill, resting by its weight on a brick foundation, was not annexed to the freehold. And that was a strong case; for the mill and ground had been demised together by the same person to the pauper. Yet it was held that the mill did not constitute a part of the tenement so as to make up the annual value of 10*l*.

COLERIDGE, J. :

In the absence of exception by custom, or in favour of trade, the rule is clear. The tenant has no right to remove the whole or any part of what is fixed to the freehold. The question therefore is, What is fixed? That is, in the present case, What does the barn consist of? Does it include the stone caps, or merely the wood work? I apprehend that the wood work is the whole barn. That wooden barn is supported by mere pressure. And this meets the argument suggested as to the criterion being whether one part of the building be erected with a view to the other.

Rule discharged.

LAWSON *v.* LANGLEY (1).

(4 Adol. & Ellis, 890—891.)

1836.
April 30.

[890]

To support a plea under the Prescription Act of a right of way enjoyed for forty years, evidence may be given of user more than forty years back.

TRESPASS. The first count was for breaking and entering plaintiff's close; the second count, for laying mortar &c. upon it. Pleas: 1st, Not guilty; 2nd, As to the breaking and entering, that defendant was occupier of a workshop, &c.; and that the occupiers for the time being of the said workshop, &c., for the full period of forty years next before the commencement of this suit, have actually, and as of right, and without interruption, enjoyed, and defendant, as such occupier of the said workshop, &c., still of right ought to enjoy without interruption, a certain &c. (justifying in right of a foot and horse way). Replication, traversing the enjoyment as of right as alleged. Issues were joined on these pleas. On the trial before Littledale, J., at the Spring Assizes for the county of Rutland, in 1835, the plaintiff began, and offered evidence to shew that, at periods both within and beyond forty years from the commencement of this action, the way in question had not been enjoyed. The evidence beyond forty years was objected to, and excluded. The defendant's counsel afterwards offered evidence of user: but, on his proposing to carry this fifty years back, it was objected that, consistently with the ruling which had already taken place, the defendant could not, on the issue joined upon the second plea, and under stat. 2 & 3 Will. IV. c. 71, s. 2, extend his proof beyond the forty years. In reply, it was contended that the evidence was admissible, either as substantive proof for the defendant, or in contradiction to the plaintiff's case. The learned Judge rejected the evidence, doubting at the same *time whether that on behalf of the plaintiff, going more than forty years back, ought not to have been received. The plaintiff had a verdict on the second plea. In the next Term *Adams*, Serjt. obtained a rule *nisi* for a new trial, on the ground, among others, of the

[*891]

(1) Cited in judgment of LINDLEY, 13 Q. B. Div. 301, 309, 53 L. J. Q. B. L. J., in *Hollins v. Verney* (1884) 430, 433.—R. C.

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above rejection of evidence. The learned Judge's report being now read,

LORD DENMAN, Ch. J. said :

Surely the user fifty years ago was some evidence as to the state of things at the distance of forty. Indeed I should think that proof as to the user of the road at any time could scarcely be excluded ; though, if it went no further than to shew what had taken place at a very distant period, it would amount to nothing. However, it is sufficient to decide on points as they come before us. I think the rule must be absolute.

LITLEDALE, J. :

If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one. I think the evidence of user more than forty years back was admissible.

PATTESON and COLERIDGE, JJ. concurred.

Rule absolute.

Humfrey and *G. T. White* were to have opposed the rule, but did not argue, the opinion of the Court being decided on the point. *Adams*, Serjt. and *N. R. Clarke* were to have supported the rule.

1836.
May 2.

ELIZABETH URMSTON v. THOMAS NEWCOMEN.

(4 Adol. & Ellis, 899—912 ; S. C. 6 N. & M. 454 ; 5 L. J. (N. S.) K. B. 175.)

[899]

Quære, whether a father deserting his infant child be liable in assumpsit to a party who supplies the child with necessaries, no further proof of contract being given ?

No such action can be maintained, if the father had reasonable ground to suppose that the child was provided for.

U. offered to N. to take care of N.'s child, without putting N. to any expense ; upon which N. gave up the child to U. Afterwards U. gave up the child to N.'s wife, who was living apart from N., in adultery ; and afterwards the child, to escape cruel treatment by N.'s wife and the

adulterer, returned to U., who maintained it thenceforward: Held, that N., who had no notice of the child's quitting U. at all, or of the cruelty, was not liable to U. for the maintenance of the child, inasmuch as the facts did not shew any desertion of the child by N., and negatived a contract between N. and U.

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And that it made no difference that U., when she made the original undertaking, was a married woman; the ground of the decision being, not that U. had made a valid contract, but that the circumstances negatived desertion; and that, therefore, the question as to the implied liability did not arise.

ASSUMPSIT for work and labour in instructing Elizabeth Newcomen, the infant daughter of the defendant, in reading, &c., and other necessary and useful accomplishments, &c., at the special instance and *request of the defendant, and for clothing and suitable apparel, &c., and other necessary things by the plaintiff found and provided, and used, &c., in and about that work and labour, and at his like special &c., and for meat, drink, &c., found, &c., at the like special &c., and for other work and labour, and for goods sold and delivered, for money lent, for money paid, for money had and received, and on an account stated. Plea, *Non assumpsit* (1).

[*900]

On the trial before Lord Denman, Ch. J., at the Middlesex sittings after Michaelmas Term, 1834, the following facts appeared: On the 8th of March, 1806, the defendant married Elizabeth Urmston, the daughter of Captain Urmston and Mrs. Urmston, the plaintiff. On the 10th of June, 1810, Mrs. Newcomen left her husband's house and went to live with Major Stratford, with whom she continued living in adultery till some time between 1825 and 1829, when Major Stratford forsook her. She never returned to her husband. On the 10th of February, 1811, while she was living with Major Stratford, she was delivered of a daughter, Elizabeth Newcomen. In June, 1812, a female servant of Mrs. Newcomen, named M'Namara, took the child to the neighbourhood of the defendant's residence, and applied to him to acknowledge and provide for her. The defendant denied that the child was his; but he sent a servant for her, and placed her with his land-steward, where she was treated with great neglect. The plaintiff learning this, and

(1) There were other issues, not material to the point here decided, which were found for the plaintiff.

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 [*901]

hearing that the defendant proposed to send the child to the Foundling Hospital in Dublin, applied to him for her. He refused to give her up without a *written undertaking that the plaintiff would provide for her. The plaintiff then wrote and signed the following paper, addressed to Nicholas Ellis, an attorney in Dublin :

“ I shall never ask him for a sixpence for it.

“ Order for Mrs. Newcomen's child.

“ Whoever has Mrs. Newcomen's child, please to deliver her to Mr. Ellis, or Mrs. M'Namara, or to Mr. Ellis's order, with all her things sent with her ; and Mr. Newcomen will never be asked for a shilling, either for her maintenance, clothes, education, or journey.

“ September 27, 1812.

“ ELIZA URMSTON.”

This letter was forwarded through Mr. Ellis to the defendant, and the child was given up by the land-steward, and sent to the plaintiff. In 1813 or 1814, the defendant quitted Ireland and went to the Continent. He came to England in 1826, where he remained for a short time, then returned to the Continent, and in 1827 returned to Ireland ; since which time he had been almost constantly, up to the commencement of the action, in Ireland or England. Miss Newcomen remained under the plaintiff's care for about two years ; when Mrs. Newcomen took her away, and took charge of her. The plaintiff's husband, Captain Urmston, died in November or December, 1815. In 1816, Mrs. Newcomen sent the child back to the defendant, but took her again in about three years. After Miss Newcomen was so taken back, she was treated with great cruelty by Major Stratford and Mrs. Newcomen, and, in 1825, having been violently beaten by Mrs. Newcomen, she escaped from the house, and fled to the defendant, who maintained her from that time. She became extremely ill, which she attributed to the treatment received from her *mother ; and, for some years before the commencement of the action, was confined to her bed by a spinal complaint, and unable to stand. Mrs. Newcomen died on the 6th of January, 1832 ; when a letter was sent by the plaintiff to the defendant, announcing the death of

[*902]

Mrs. Newcomen, and adding, "I trust I shall receive a remittance to put her decently under ground, being the last thing that can be done, and the last claim on you. Surely you cannot dispute the payment of her funeral, which shall be as moderate as possible."

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The defendant had never contributed to the expenses of the maintenance of Miss Newcomen since she was received from him in 1812. This action was brought for the expenses to which the plaintiff had been put for her. The writ was sued out on October 11th, 1832. For the plaintiff it was contended that a father who deserted his child was liable to repay the party who maintained it. The LORD CHIEF JUSTICE directed the jury to find for the plaintiff, unless they thought she had waived her claim by the letter of January 6th, 1832. The jury found for the plaintiff, giving at the rate of 80*l.* per annum, up to the commencement of the action.

In Hilary Term, 1835, *Sir W. W. Follett*, Solicitor-General, obtained a rule for a new trial for misdirection, or for a nonsuit, or for a reduction of damages on the ground that the jury should have given no damages for the time subsequent to Miss Newcomen attaining the age of twenty-one.

[After argument upon shewing cause:]

LORD DENMAN, Ch. J. :

[908]

The general question is important; but the facts do not raise it. In order that the law should imply a liability in the father to repay another for supporting his child, it is absolutely necessary that desertion of the child by the father should be proved. Now that is not shewn here. The strongest way in which the case can be put for the plaintiff is, that utter neglect and want of inquiry, on the part of the father, might be like a deliberate desertion. But the evidence does not go even that length. For, though the plaintiff's letter might not always be present to her mind, and though she might even have discontinued her intention of providing for the child, the father might say, "by the desire of the child's grandmother, and on her express undertaking that I should not be put to any

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expense, I left the child with her." *While he had reason to suppose that the grandmother was maintaining the child at her own expense, he could not be said to neglect the child. Such an expectation may perhaps now appear to have been unreasonable, and contrary to the fact; but that does not shew that his conduct at the time amounted to total neglect. It would be unjust to a father, who was poor, and had thought that another would save him from the expense of providing for his child, to hold that he was guilty of desertion by acting upon such a belief. We have no right to suppose that, if he had had notice from the grandmother that she would no longer maintain the child, he would not have taken care of it. The general question, therefore, which we should approach with much anxiety, does not arise; but, upon the other and more limited view of the case, I think this rule should be made absolute for a new trial.

LITLEDALE, J. :

[*910]

The general question does not arise. The mother leaves the father, and lives in adultery; then a child is born, as to which the father, apparently, doubts whether it be his; and he is going to put it into the Foundling Hospital; the grandmother, not liking this, sends for the child, and says (with or without the knowledge of her own husband) that the defendant shall be put to no expense. The child is then put into her custody. Afterwards the mother takes it; after which it is sent back again to the grandmother, and then to the mother again: and then it returns to the grandmother; being sent backwards and forwards according to the caprice of the mother. As far as related to the defendant, the child was still in the custody of the grandmother; for he is not proved to *have known that she was not in that custody, or that the circumstances of cruelty had occurred. His original wish had been to put her in the Foundling Hospital at Dublin; and he might well presume that she was in custody better than that of the Foundling Hospital. I do not say that he might not have found out how the fact actually was; perhaps he might not be anxious to learn: but the grandmother never applied to him. As to the argument that the plaintiff was a married woman, and not capable of entering into the undertaking.

that is immaterial; for the question is not, whether the undertaking created a legal charge on the plaintiff.

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PATTESON, J. :

I agree that the general question does not arise. The circumstances are peculiar. The plaintiff cannot say that the defendant made a contract, either express or implied, with her. The defendant doubted whether the child was his; however, he had the control over it, and placed it with his steward. He was about to provide for it (whether he was right or wrong as to the provision which he meant to make is immaterial); and then, at the request of the plaintiff herself, he gave it up to her. The plaintiff was then a married woman; but it is immaterial whether the letter of September 27th constituted a binding contract on the plaintiff: it is enough, if it induced the defendant to part with the child, so as to negative the presumption of a contract by him. Afterwards, it is true, the child is taken from the grandmother: but that was in no sense the act of the defendant; the child was taken by the mother, then living apart from the plaintiff in a state of adultery, and we know of no communication between the plaintiff and his wife. The defendant, therefore, did not of *his own act take the child out of the plaintiff's custody. No communication is made to him till 1832. But it is said that he was abroad. If he was (which, however, is negatived even as to a part of 1826), it makes no difference. A letter would go abroad: this is not a question as to suing a party who is abroad, but of giving him notice. A letter might have been written to the Continent as well as to a place in this country. The plaintiff took no steps to shew the defendant that he must come forward; she, therefore, has no right to sue him. This leaves untouched the question, how far a party, who finds a child in a state of destitution, and provides for it, can sue its father.

[*911]

COLERIDGE, J. :

It is best to say nothing on the general question. For the purpose of this case, I will assume (what is not to be understood as my opinion at present) that the general liability is as contended

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by the *Attorney-General*. Then how does the plaintiff charge the defendant? The child is treated by the plaintiff as legitimate, and placed under the charge of his steward. The grandmother finds that the child is ill treated; but it does not seem that the defendant knew this. He parts with the custody on an express understanding that he is to be put to no further expense. It is said that the plaintiff was a married woman. But suppose her husband, while alive, had brought the action, the defence would have been, not an allegation that the plaintiff had contracted, but a repudiation of any contract by the defendant. It is material too that, although the expense sued for was incurred during a series of years, no knowledge at all is brought home to the defendant of the child's being, at any period, otherwise than *under the care of an indulgent grandmother; he, therefore, stands on the same footing as when he first parted with the child.

[*912]

Rule absolute for a new trial.

1836.
May 3.
[916]

COLEBROOKE v. TICKELL AND WALKER.

(4 Adol. & Ellis, 916—928; S. C. 6 N. & M. 483; 2 H. & W. 23; 5 L. J. (N. S.) K. B. 180.)

Where it is sought under a statute to charge the subject with a rate to which he was not liable before, the person claiming to levy the rate must shew that the words imposing it are clear and intelligible (1).

TRESPASS for distraining plaintiff's goods. Plea (under stat. 21 Jac. I. c. 12, s. 3 (2), and the local Acts after mentioned), Not guilty. The following case was stated for the opinion of the Court, pursuant to stat. 3 & 4 Will. IV. c. 42, s. 25 (3).

[*917]

Stat. 11 Geo. III. c. 15, for the better paving that part *of the High Street, in the parish of Whitechapel, which lies in Middlesex, &c., appoints commissioners for the purposes therein mentioned; and it recites (sect. 38), that "there is due, and has

(1) See the principle applied in *Authorities Protection Act, 1893*
Ingram v. Drinkwater (1875) 44 L. J. (56 & 57 Vict. c. 61).

P. C. 83, 86.—R. C.

(3) See 44 & 45 Vict. c. 59, s. 3.

(2) Repealed. See now the Public

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been accustomed to be received, for every cart or waggon loaded with hay brought into the said parish, and sold on the usual market days, the sum of 6*d.*, 2*d.* whereof is due and of right belonging to the lord of the manor of Stebonheath, otherwise Stepney, in the county of Middlesex, as owner or proprietor of the said market, and has accordingly, from time to time been paid to and received by him ;” and that 2*d.*, other part of the said 6*d.*, is due to the parish for taking away the dirt occasioned by such carts, &c., and has been paid to the householders and inhabitants before whose doors such carts, &c. have stood on the market days, for the use of the parish ; and that the remaining 2*d.* is due to and has been received by the last-mentioned householders and inhabitants. It is then enacted, for the better carrying into execution the purposes of the Act, that from and after &c., there shall be paid to the receiver or receivers, collector or collectors, to be appointed by the said commissioners, “for every cart or waggon loaded with hay, which shall be brought into the said parish for sale on the usual market days, and sold or exposed for sale, the aforesaid sum of 6*d.* in lieu of all other tolls which are or shall be authorised to be taken and collected, the said receiver or receivers, collector or collectors, paying thereout to the lord of the said manor, or such other person as shall be owner or proprietor of the said market for the time being, or such person or persons as shall be appointed by him or them to receive the same, the sum of 2*d.* clear of all charges and expenses, *for every cart or waggon loaded with hay, which shall be brought into the said parish, and sold or exposed to sale on the usual market days as aforesaid.”

[*918]

Section 34 enacts, for defraying the charges attending the execution of the powers of this Act, that a rate or assessment, over and above those now payable, shall, once or oftener in every year, be made and assessed by the commissioners upon all persons “who do or shall inhabit, hold, occupy, possess, or enjoy any house, shop, warehouse, cellar, vault, or other tenement within the said street,” for raising such a sum as the commissioners shall think needful, so as such rate or rates do not in any year exceed, in the whole, 1*s.* 6*d.* in the pound “of

COLEBROOKE the yearly rents or yearly values of such houses, shops, ware-
 houses, cellars, vaults, or other tenements or hereditaments
 TICKELL. respectively; and that all and every tenant of every house,
 shop, warehouse, cellar, vault, or other tenement or heredita-
 ment, shall and may deduct one third of such sum as shall be so
 assessed," out of his rent, and "the landlord and landlords,
 owner or owners of such premises" are required to allow such
 deduction, on the residue being paid.

Stat. 46 Geo. III. c. lxxxix. (local and personal, public), "for
 the better relief," &c. "of the poor within the parish of St. Mary,
 Whitechapel, in the county of Middlesex; for cleansing and
 lighting the squares," &c. and keeping a nightly watch, and for
 raising money for repairing certain of the highways, and the
 parish church, enacts, by sect. 53, "That from and after the
 passing of this Act, the rector, churchwardens, overseers of
 the poor, and vestrymen of the said parish" of Whitechapel,
 "qualified as aforesaid, shall assemble and meet together in the
 [*919] vestry-room of the said parish, within" *fourteen days after the
 sums to be levied shall have been ascertained, as is directed to
 be done annually by sect. 52, "and the said rector," &c. "or
 any nine or more of them, so assembled, shall, and they are
 hereby required to make and sign three distinct rates or assess-
 ments, not exceeding the amount of the respective sums so settled
 and ascertained, upon all and every the person and persons who
 do and shall inhabit, hold, occupy, possess, or enjoy any land,
 house, shop, warehouse, or other building, tenement, or heredita-
 ment; (that is to say), one rate or assessment for the relief,
 maintenance, regulation, and employment of the poor of the said
 parish; and also for paying" (composition money to the trustees
 under a certain Highway Act); "one other rate or assessment
 for defraying the expenses of the repairs of the said parish
 church," and for payment of certain annuitants charged thereon;
 "and one other rate or assessment for cleansing and lighting
 the squares, streets," &c., "and regulating a nightly watch, and
 repairing the highways within such parts of the said parish as
 are not within the said liberties of his Majesty's Tower of
 London, and city of London; such last mentioned rate to be
 a pound rate upon or according to the annual rent or value of

all messuages, lands, tenements, and hereditaments, as shall be held or occupied within such parts of the said parish as are not within the said liberties, provided that the same does not exceed in any one year the sum of 1s. 3d. in the pound upon such messuages, lands, tenements, and hereditaments." COLEBROOKE
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Sect. 60 enacts that the rates to be made and assessed as aforesaid, for the relief of the poor, "shall be received, collected, levied, and recovered in such and *the same manner as rates and assessments made for the relief of the poor are directed to be levied and recovered by the said Act passed," &c. (43 Eliz. c. 2), "or by any subsequent Act or Acts relating to the relief of the poor; and such said several methods of levying and recovering the said rates or assessments for the relief, maintenance, and employment of the poor, shall and they are hereby declared to be the legal methods of enforcing the rates or assessments directed to be made in pursuance of the said Act for the relief, maintenance, and employment of the poor of the said parish, as fully and effectually as if such ways and methods were repeated and re-enacted in the body of this Act."

[*920]

Other clauses of the two local Acts were stated in the case, which it is unnecessary to notice further than as they are adverted to in the argument.

The plaintiff is lord of the manor of Stepney, and owner of the market above mentioned; and, during the time for which the after-mentioned rates were made, he received the sums of 2*l.* payable to the owner of the market under stat. 11 Geo. III. c. 15, s. 38. There was no ground for rating the plaintiff, unless he was rateable "in respect of the market, or the said money payment in lieu of toll."

The case stated that the rector, &c., assembled according to stat. 46 Geo. III. c. lxxxix. above mentioned, duly made and signed three distinct rates or assessments (not exceeding the sums settled and ascertained according to the statute), "upon all and every the person or persons who did inhabit, hold, occupy, possess, or enjoy, any land, house, shop, warehouse, or other building, tenement, or hereditament, and among others upon the said plaintiff," as lord of the manor and owner of the market, in respect *of the said sum of 2*l.* for every cart or

[*921]

COLEBROOKE waggon, &c. One of the rates to which he was assessed was
 TICKELL. for the relief of the poor and other purposes; the other rate, for
 cleansing and lighting the squares, streets, &c., and repairing
 the highways. The rates were duly allowed and published.
 The plaintiff not having paid the sums assessed upon him by
 these rates, his goods (after summons, &c.) were distrained upon
 by virtue of two warrants under the hands and seals of the
 defendants, justices of Middlesex.

The question for this Court was, whether the plaintiff was
 liable to either of the two rates on account of the sums of 2*l.*
 payable to him as above stated.

[After argument:]

[925] LORD DENMAN, Ch. J. :

I think the plaintiff is entitled to judgment. It is true that he
 does, in one sense of the words used in stat. 46 Geo. III. c. lxxxix.,
 “enjoy” a “hereditament”; but we must take the words, as
 was done in *Rex v. The Manchester and Salford Waterworks*
Company (1) and *Rex v. Mosley* (2), with reference to the other
 [*926] words used in the same part of the Act. The *words now
 in question “inhabit, hold, occupy, possess or enjoy any land,
 house, shop, warehouse, or other building, tenement, or heredita-
 ment,” are large, and so they should be, to make a person rate-
 able, who was not so under the statute of Elizabeth. I cannot
 say what would be rateable, under the words here used after
 “land, house, shop, warehouse, or other building,” unless it
 were the kind of hereditaments to which this case relates: but
 there are other clauses in the Act which limit the sense; and
 I think the last clause of sect. 53, which fixes the rate there
 mentioned “upon or according to the annual rent or value of
 all messuages, lands, tenements, and hereditaments, as shall be
 held or occupied within such parts of the said parish as are not
 within the said liberties,” shew that the former more general
 words apply only to what may be the subject of corporeal
 occupation. It is true that this language occurs with reference
 to one rate only; but it would be irrational to suppose that the

(1) 1 B. & C. 630.

(2) 26 R. R. 328 (2 B. & C. 226).

words were used for the purpose of excepting the payments for market toll from that particular rate.

COLEBROOKE
T.
TICKELL.

LITTLEDALE, J. :

I am of opinion that the word “hereditament,” in section 53 of stat. 46 Geo. III. c. lxxxix., is to be confined to such things as are the subject of actual occupation. In stat. 11 Geo. III. c. 15, s. 34, it is clearly so confined; (his Lordship then commented on this clause). And, in section 53 of the subsequent Act, the last clause differs from the previous ones in which “hereditaments” are mentioned, if that word, in the previous clauses, is to have the extended sense which has been insisted upon. It may be said of tolls that they are “hereditaments” to be “held,” according to the language used in the last clause of sect. 53, but the words “held or occupied within such parts of the said parish” imply something local, which the payments in question are not. The direction in sect. 60, referring to the statute of Elizabeth, is general, and, in the absence of any provision to a different effect, shews, I think, that the subject-matter of regulation is the same as under that statute. The present Act does not seem to me to extend it. In sections 69, 70, and 71, “hereditaments” is applied to things which are the subject of occupation. The word being thus confined in so many clauses, I think that the Legislature must be taken, in using it, to have contemplated those things only which are the subject of occupation. There does not appear to me to be any intimation of a design, in this Act, to make persons liable to rates, who were not so under the former law.

[*927]

PATTESON, J. :

I think the plaintiff is clearly entitled to recover. He was not liable to be rated for the tolls down to 1770, nor does anything appear in the statute 11 Geo. III. c. 15, passed in that year, which could render him liable in respect of the payments to be made to him under that statute. We are then called upon, under the subsequent Act, to introduce such a liability by virtue of the word “hereditament.” But the rate authorised by the clause in which that word occurs is a new rate, sanctioned by a local and

COLEBROOKE personal Act, which passed, as far as we know, behind the back
 T. of the owner of this market; and I cannot believe that, in an
 TICKELL. Act so brought in, such an intention was entertained. If it was,
 it is strange that the words should not have been clearer: for
 words intended to lay a charge on the subject, which he was not
 [*928] liable to before, ought to be clear and intelligible. *If “heredita-
 ment,” in the clause in question, meant hereditaments generally,
 why was the previous enumeration made? I think that “here-
 ditament” here means things *ejusdem generis* with those previously
 mentioned, according to the mode of construction adopted in
Rex v. The Manchester and Salford Waterworks Company (1) and
Rex v. Mosley (2). In *Rex v. The Trustees for paving Shrews-*
bury (3) the word “hereditaments” was not taken in a sense
 extending beyond the descriptions of property with which it was
 associated; the property held rateable was *ejusdem generis* with
 “meadows and pastures.” We are not, therefore, obliged to
 adopt a construction of the clause now in question which would
 be contrary to the ordinary meaning of the language used, and to
 justice and fairness.

COLERIDGE, J. :

It seems conceded, on the one side, that “hereditament” may mean, and, on the other, that it does not necessarily mean, the kind of property now in question. The onus of shewing what is its proper sense in the present case lies upon those who seek to impose a new burden. In stat. 11 Geo. III. c. 15, the thirty-fourth section, which imposes the paving rate, uses the word in a manner evidently shewing that something corporeal and local is intended. And it is clearly used in a like sense in the latter part of section 53 of stat. 46 Geo. III. c. lxxxix. I think, therefore, that the defendants fail in making out that the Legislature uses the word in the sense which they would ascribe to it.

Judgment for the plaintiff.

(1) 1 B. & C. 630.

(3) 37 R. R. 409 (3 B. & Ad.

(2) 26 R. R. 328 (2 B. & C. 226). 216).

IN THE MATTER OF THE ARBITRATION BETWEEN JAMIESON
AND BINNS AND DEAN.

1836.
May 5.
[945]

(4 Adol. & Ellis, 945—948; S. C. 5 L. J. (N. S.) K. B. 187.)

Where arbitrators have decided the choice of an umpire by tossing up, the acquiescence of parties, subsequently to the choice, and before the reference is proceeded in, does not render the appointment valid, unless the parties acquiescing have knowledge of all the circumstances under which the choice was made.

Therefore, where one of two arbitrators objected to S. as umpire, and afterwards the two arbitrators tossed up, and the other arbitrator won, and named S., and the attorney of one of the parties, knowing that the arbitrators had tossed up, but not knowing that one of them had objected to S., proceeded in the reference, it was held that the irregularity was not cured. And this, though the ground of the arbitrator's objection to S. was negatived by affidavit.

DISPUTES having arisen between Jamieson on the one side, and Binns and Dean on the other, they, by agreement, referred all matters in dispute to the arbitration of Marler and Wright, or to the award and umpirage of such person as they should appoint to be umpire between them. Marler and Wright appointed Southam to be umpire; and he afterwards made his award. In Michaelmas Term last, *Sir W. W. Follett* obtained a rule, on the part of Jamieson, calling upon Binns and Dean to shew cause why the award or umpirage should not be set aside, on the ground, among others, that the umpire was not duly appointed by the choice of the arbitrators, but that his appointment was decided by chance. Each of the two arbitrators, originally named, had proposed several persons as umpire, but the arbitrators had been unable to agree: Wright, the arbitrator named by Binns and Dean, had proposed, among other persons, Southam; but Marler, the arbitrator named by Jamieson, had objected to Southam for reasons stated in the affidavit in support of the rule. Wright and Marler finally agreed that each should write down two names, that then each should strike out one of the four, and that it should be decided by tossing up, whether Wright or Marler should choose one of the two remaining names. Wright won the *toss, and named Southam. Jamieson swore that he had never assented to the nomination of Southam, and that he proceeded in the reference without being aware of the manner in which he had been appointed. Mr. Earle, the

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In re
JAMIESON
AND BINNS.

attorney who attended the arbitration for Jamieson, swore that he himself had never assented to the appointment of Southam, but attended under the impression that his client was bound by the appointment. The affidavits filed in answer stated that Earle, before he attended the reference, had been informed of the manner in which Southam had been appointed, and never objected; and that, on the contrary, he had taken part in indorsing the appointment on the agreement of reference; but it did not appear that he knew of Marler having objected to Southam as an umpire; and it was denied, by the affidavits, that Marler had so objected. The affidavits also negatived the facts upon which Marler's objections to Southam were stated, in the affidavits on the other side, to have been founded.

Sir J. Campbell, Attorney-General, and *W. H. Watson* now shewed cause:

It was decided in *Ford v. Jones* (1) that the arbitrators must not choose an umpire by chance. But in *In the Matter of Tunno and Bird* (2) the Court so far qualified that doctrine as to hold that, if a party himself assents to such a method of choice before it actually takes place, he cannot afterwards object to it. Here the agent of Jamieson, knowing how the choice had been made, proceeded in the reference: that is a ratification, and must have the same effect as an assent before the choice.

[*947] (PATTESON, J.: *Ford v. Jones* (1) seems inaccurately reported, as to *the fact of knowledge by the parties (3).)

The assent of the parties cures irregularities which consist in failing to pursue the precise terms of the reference. Thus, if the umpire is to be appointed before proceeding in the reference, and the arbitrators enlarge the time before such appointment, the appointment is irregular; yet this is cured by the assent of the parties with knowledge: *In the Matter of Hick* (4). So in *Wells v. Cooke* (5), where the umpire was appointed by lot, the

(1) 37 R. R. 424 (3 B. & Ad. 248).

(2) 39 R. R. 537 (5 B. & Ad. 488).

(3) See the remarks of the learned Judge in *In the Matter of Tunno and*

Bird, 39 R. R. 537, 544 (5 B. & Ad.

498).

(4) 21 R. R. 511 (8 Taunt. 691).

(5) 20 R. R. 409 (2 B. & Ald. 218).

argument in support of the award failed only because the knowledge of the parties was not proved; it may be inferred from the report that, if the knowledge had been shewn, the irregularity would have been cured.

In re
JAMIESON
AND BINNS.

(PATTERSON, J. : That is never a very sound argument.)

Sir W. W. Follett in support of the rule :

The argument urged in support of the award assumes that Earle had full knowledge of the facts: but he did not know that one of the arbitrators objected to the umpire; and, if he had known it, he probably would not have proceeded in the reference.

(LORD DENMAN, Ch. J. : If two persons named for umpire be equally fit, and there be no reason for preferring one to the other, it seems as if an appeal to chance, or some accidental circumstance, must decide the choice.)

The parties stipulate for an exercise of the judgment of both arbitrators in the choice, and here they have not had it.

LORD DENMAN, Ch. J. :

It certainly is not desirable that chance should ever be resorted to: such a proceeding is *apt to lead to issues of fact upon the affidavits, which we can hardly decide, and to a waste of time and money. *In the Matter of Tunno and Bird* (1), an award was upheld because the parties on both sides, being fully aware of all the circumstances, proceeded with the reference. But here, supposing the attorney's assent to be sufficient to bind the party, an important circumstance was not disclosed, namely, that the umpire had been personally objected to by the arbitrator, who afterwards, most improperly, consented to toss up. That was not brought to Earle's knowledge; if it had been, the point now suggested in support of the award would have arisen.

[*948]

LITTLEDALE, J. :

The facts here were not all communicated, for the attorney

(1) 39 R. R. 537 (5 B. & Ad. 488).

In re
JAMIESON
AND BINNS.

did not know that one of the arbitrators objected to the umpire who was chosen.

PATTESON, J. :

I hoped that *In the Matter of Tunno and Bird* (1) had settled the law. But the decision there went on the assent with knowledge of all the facts. Without such knowledge, it must not be taken that an assent is valid : in truth it is no assent.

COLERIDGE, J. :

Such a choice can be made good only by consent; and consent can exist only where there is knowledge of all the facts.

Rule absolute.

1836.
May 6.
[954]

HOUGH AND OTHERS v. MAY.

(4 Adol. & Ellis, 954—958; S. C. 6 N. & M. 535; 2 H. & W. 33; 5 L. J. (N. S.) K. B. 186.)

To assumpsit for work and labour in making a railing, defendant pleaded, that before the action he had paid to plaintiff the sum of 8*l.* 11*s.*, and plaintiff had received and accepted the same, in payment and discharge of 8*l.* 11*s.* Replication, that defendant did not pay to plaintiff the said sum of 8*l.* 11*s.* in manner &c. :

Held, that the defendant did not support his issue, by shewing that, before the action, he had sent plaintiff a cheque on his banker for 8*l.* 11*s.* stated in the body of the cheque to be "balance account railing;" and that plaintiff held the cheque at the commencement of the action. A cheque so delivered, to operate as payment, must at any rate be unconditional.

And (per LITLEDALE, J.) a party to whom a cheque is sent may commence an action before he sends it back :

Held also, that it was no misdirection to leave it to the jury, only, whether the plaintiffs received the cheque as money.

ASSUMPSIT for work and labour, and materials found, and on an account stated. Second plea, as to 8*l.* 10*s.*, parcel &c., that the defendant after the making of the promises &c., and before the commencement &c., to wit, on &c., "paid to the plaintiffs the sum of 8*l.* 11*s.*, and the plaintiffs then received and accepted the same, in payment and discharge of the said sum of 8*l.* 11*s.* in the introductory part of this plea mentioned." Verification. Replication, "That the defendant did not pay to the plaintiffs

(1) 39 R. R. 537 (5 B. & Ad. 488).

the said sum of money in the said second plea mentioned in discharge of the said sum of 8*l.* 11*s.*," in manner &c. Conclusion to the country. There were other issues on the record.

HOUGH
v.
MAY.

On the trial before the Under-Sheriff of Middlesex (April 14th, 1836), it appeared that the action was for an iron railing put up by the plaintiffs for the defendant. The defendant's case, in support of the issue on the second plea, was that he had sent to the plaintiffs, on the 7th of November, 1835, a cheque drawn by the defendant on his bankers for 8*l.* 11*s.*, which cheque had remained in the plaintiffs' hands since then, the action having been commenced on the 10th of the same month. The plaintiffs produced the cheque upon the defendant's calling for it. It was as follows:

Messrs. DORRIEN & Co.

7 Nov. 1835.

[955]

Pay Messrs. Hough & Co. balance account railing or bearer 8*l.* 11*s.*

£8 11*s.* 0*d.*

WILLIAM MAY.

On the 13th of November the plaintiffs' attorney wrote to the defendant, stating that, as the defendant had not sent the amount, as requested in a letter of the 6th, he had issued a writ; adding, "the cheque you sent to Messrs. Hough is ready to be returned." No question was raised as to the date of the receipt of the cheque by the plaintiffs; but they contended that this evidence did not sustain the issue on the defendant's part. As to this, the under-sheriff desired the jury to say whether the plaintiffs received the cheque as money. The jury found that they did not; and, the other issues being found for the plaintiffs, they had a verdict for 8*l.* 18*s.*; the under-sheriff reserving leave to move to reduce the verdict to 7*s.*, if the Court should be of opinion that the cheque was payment. In this Term *T. F. Ellis* obtained a rule for reducing the damages accordingly, and also for a new trial on the ground that the question was improperly left to the jury.

[After argument upon shewing cause:]

LORD DENMAN, Ch. J.:

[957]

The question is, whether the plaintiffs have been paid 8*l.* 11*s.*

HOUGH
 &
 MAY.

To make the delivery of a cheque a payment, it should at least be unconditional. As this cheque is framed, it would be evidence against the plaintiffs, if they made use of it. The case might be different, if it were unconditional; but, even then, the party receiving it would be entitled to exercise his discretion as to presenting it.

LITLEDALE, J. :

The case would be different, if the plaintiffs had received the cheque as money; but all that appears is, that it was sent to them by the defendant. They say, "We never authorised the sending of this cheque to us, and we shall commence an action." Perhaps a party ought, under such circumstances, to send the cheque back: but here the plaintiffs offer to do so; and they were not bound to suspend the commencement of the action till they had returned the cheque. Again, I rather think that the condition inserted in the cheque might be evidence against the plaintiffs, if they presented *it. On both grounds, therefore, this rule must be discharged.

[*958]

PATTESON, J. :

The rule must be discharged on both grounds. On this issue, it is not sufficient to prove that the cheque was sent by way of payment; but it should be shewn that the circumstances were such as would make the cheque a payment by the defendant to the plaintiffs. To call upon the plaintiffs to present such a cheque, is like requiring a party, to whom money is paid, to give a receipt in full for all demands. I do not say that every thing written upon the cheque would be evidence against the plaintiffs; but here the words are, "balance account." The plaintiffs could not safely use such a cheque.

COLERIDGE, J. :

Suppose this cheque had been presented, and it had been afterwards a question for a jury whether the plaintiffs had been paid in full. They would see that, before the action was brought, the plaintiffs had accepted and made use of a cheque professedly given for the then balance. The defendant must have intended

the cheque to have that effect; and, the question that arises on this record being whether the defendant had made the cheque money, the form of the cheque prevents its having that operation.

Rule discharged.

HOUGH
MAY.

MORTIN v. BURGE.

(4 Adol. & Ellis, 973—975; 6 N. & M. 601.)

On the trial of a cause, a verdict was taken for 3,000*l.* subject to a reference, the arbitrator to direct a verdict for plaintiff or defendant, as he should think proper; and to determine all matters in difference, except as to costs, the settlement of which was provided for by the order of reference. The arbitrator directed a verdict to be entered for plaintiff, (not saying for how much), and that defendant should, at a time and place named, pay plaintiff or his attorney 260*l.*:

Held, an uncertain award.

THIS cause came on to be tried at the Maidstone Spring Assizes, 1835, when a verdict was taken for the plaintiff, damages 3,000*l.*, costs 40*s.*, subject to the award of an arbitrator, who was empowered to direct a verdict to be entered for the plaintiff or defendant, as he should think proper, and to whom all matters in difference between the parties were referred, to order and determine what he should think fit to be done by either of them respecting the matters in dispute. Each party was to pay his own costs of the cause and reference, and the expenses of the award in equal moieties; *and power was given to the arbitrator to enlarge the time for making his award. The arbitrator made and published his award, dated 9th of December, 1835, and, after reciting the order, and certain enlargements of the time, he awarded as follows: "That a verdict shall be entered in the said cause for the plaintiff; and that the said George Burge shall and do, on the 19th day of December instant, between the hours" &c. "well and truly pay or cause to be paid unto the said Thomas Mortin or his attorney, at" &c., "the sum of 260*l.* 12*s.* 6*d.* of lawful money of Great Britain. In witness" &c. A rule was obtained in the next Term, January 29th, for setting aside the award, on the grounds, first, that the time for making it had not been properly enlarged; and, secondly, that the award was uncertain.

1836.
May 7.

[973]

[*974]

MORTIN
v.
BURGE.

Platt and Channell now shewed cause:

First, no objection can be urged which does not appear on the face of the award, the application not having been made within the first four days of the Term after the award was published.

(LITTLEDALE, J. : For many years after I came to the Bar, no objection of this kind was heard of. I do not think there is any such rule on the subject as the plaintiff would insist upon.)

Rawsthorn v. Arnold (1) shews the practice on the subject. The award itself is sufficiently certain, when read in connection with the order of reference. No discretion is given to the arbitrator as to costs. Nothing appears to which his direction, for the payment of 260*l.* 12*s.* 6*d.*, can apply, except the amount of the verdict.

[975]

Ogle, contra :

The reference is of the cause and all matters of difference. The verdict was taken for 3,000*l.* Consistently with this award it might be meant that the verdict should stand for that sum, and 260*l.* 12*s.* 6*d.* be paid for the other matters in difference. If it was to be paid as recovered by the verdict, the arbitrator ought not to have fixed a day for the payment.

LORD DENMAN, Ch. J. :

I am at a loss to say, upon this award, whether the arbitrator meant that the 260*l.* 12*s.* 6*d.* should be substituted for the nominal verdict taken, or be paid in respect of matters in difference. I think the award cannot be supported.

LITTLEDALE, J. :

The arbitrator should have stated for what sum the verdict was to be entered. He very likely meant that it should be for 260*l.* 12*s.* 6*d.* ; but that is surmise. The rule must be absolute.

Rule absolute (2).

(1) 6 B. & C. 629. See *Macarthur v. Campbell*, 39 R. R. 557 (5 B. & Ad. 518), 41 R. B. 377 (2 A. & E. 52); *Allenby v. Proudlock*, 4 Dowl. P. C. 54. (2) *Patteson and Coleridge, JJ.* had left the Court.

REX v. THE LORDS COMMISSIONERS OF THE TREASURY.

IN RE SMYTH.

(4 Adol. & Ellis, 976—983; S. C. 6 N. & M. 505.)

1836.

May 7.

[976]

A party to whom a superannuation allowance has been granted in pursuance of a Treasury minute, according to stat. 50 Geo. III. c. 117 (1), in respect of an office held during pleasure, has no vested interest in the allowance; but the minute may be revoked at will by the Lords of the Treasury; although the party contributed to the superannuation fund under stat. 3 Geo. IV. c. 113 (1), while the clauses as to contribution were in force.

Where a Treasury minute had been revoked under the above circumstances, this Court refused a *mandamus* calling on the Lords of the Treasury to restore the minute to their books, and to submit an application to Parliament, in the estimates for the current year, for a grant on account of the allowance sanctioned by the minute.

THE Court having, in Michaelmas Term last, made a rule absolute for a *mandamus* to the Lords Commissioners of the Treasury to issue a minute, directing payment to W. C. Smyth of his arrears of pension from April 5th, 1826, to October 10th, 1835 (2), a copy of the rule was served on the solicitor of the Treasury, and the Lords Commissioners paid the arrears, and continued paying the pension down to the 5th of April, 1836. On the 9th of April, the assistant secretary of the Treasury wrote to Mr. Smyth as follows :

“ SIR,

“ The Lords Commissioners of his Majesty’s Treasury having had before them the minute of this Board, of 6th October, 1826, in which their Lordships expressed their opinion that, under the circumstances therein stated, a vote should be submitted to Parliament for granting to you a retired allowance of 166*l.* per annum, and having also fully considered your whole case and conduct with reference to your proceedings against the

(1) Repealed by the Superannuation Act, 1834 (4 & 5 Will. IV. c. 24, s. 8).

(2) *Rex v. The Lords Commissioners of the Treasury*, 4 Ad. & El. 286. [This case is referred to in the judg-

ments in *The Queen v. Lords Commissioners of the Treasury* (1872, L. R. 7 Q. B. 387, 41 L. J. Q. B. 178) as a case of very questionable authority.—R. C.]

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[*977]

paymasters of Exchequer bills and this Board, I am commanded by their Lordships to acquaint you that, being of opinion that the directions of that *minute should be revoked, and that no application should be submitted to Parliament for a grant on this account in the estimates for the present year, their Lordships have directed those estimates to be prepared accordingly, omitting therefrom the sum heretofore included on account of that allowance.

“I am, Sir,” &c.

In this Term, April 26th, *J. Jervis* obtained a rule *nisi* for a *mandamus* to the Lords Commissioners to restore to its place in the minute book of the Treasury the minute made therein on or about the 6th day of October, 1826, in which the then Lords of the Treasury expressed their opinion that, under the circumstances therein stated, a vote should be submitted to Parliament for granting to the said William Carmichael Smyth a retired allowance at the rate of 166*l.* per annum, and to submit an application to Parliament for a grant on this account, in the estimates for the present year.

The affidavit of W. C. Smyth, on which the rule was obtained, set forth the facts detailed on the former application, down to Mr. Anson's last letter, with the additional matter stated above; and Mr. Smyth added that, as long as he enjoyed the office of Paymaster of Exchequer bills, he regularly paid a portion of his salary to the superannuation fund created by stat. 3 Geo. IV. c. 118.

An affidavit in opposition to the rule, by Mr. Unwin, clerk in the Treasury, set forth a minute of the Treasury Board, of March 29th, 1836, in pursuance of which the letter of April 9th was written, and which, after referring to the minute of October 6th, 1826 (for recommending *the grant of a pension to Mr. Smyth), proceeds as follows :

“My Lords having fully considered the whole case and conduct of Mr. Carmichael Smyth, with reference to his proceedings affecting the paymasters of Exchequer bills, and this Board, their Lordships are of opinion that the directions of that minute should be revoked, and that no application should be submitted to Parliament for a grant on his account in the estimates for the

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ensuing year, about to be laid on the table of the House of Commons. My Lords have therefore to desire that the estimates may be prepared accordingly, by omitting therefrom the sum heretofore included on account of that allowance. Acquaint Mr. Carmichael Smyth accordingly."

It was also stated by Mr. Wood, an accountant in the Exchequer Bill Office, that all such portions of Mr. Smyth's salary as had been deducted, and contributed to the superannuation fund, had, as the deponent believed, been repaid to Smyth on or about February 3rd, 1825, in pursuance of stat. 5 Geo. IV. c. 104, s. 3.

Sir John Campbell, Attorney-General (with whom was *Wightman*), now shewed cause, and contended that the Court had no authority to issue the *mandamus* as prayed. And he referred to *Smyth v. Latham* (1). The COURT called upon

J. Jervis and *Welsby* in support of the rule :

Smyth v. Latham (1) decided that the plaintiff was removable at pleasure from his office of paymaster, by the Lords *of the Treasury. But the question here is whether, after he has been so removed, and a pension has been granted him pursuant to Act of Parliament, the Lords of the Treasury can strike him off the pension list.

[*979]

(LORD DENMAN, Ch. J.: What right have we to tell any man that he shall, as a Member of Parliament, do such and such things?)

The application is, that Mr. Smyth's name may be put into the estimates. When they are presented, Parliament will deal with them as it thinks proper.

(COLERIDGE, J.: What power have we to make any one submit estimates at all?)

Stat. 50 Geo. III. c. 117 (2) restrained the discretion formerly exercised as to the allowance of pensions, by the enactments, in sect. 1, for laying before Parliament the annual increase and diminution, with the grounds, and other circumstances. The

(1) 1 Cr. & M. 547; 3 Tyr. 509.

(2) See stat. 4 & 5 Will. IV. c. 24.

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exhibiting of such accounts, with respect, among other things, to the superannuation allowances, became then a statutory duty. Stat. 3 Geo. IV. c. 113 (1), which directs payments to be made out of salaries, in certain proportions, to raise a superannuation fund, recognizes a title, in the persons making such payments, to the allowances out of the fund. Sect. 1 recites the necessity of reducing some of the superannuation allowances grantable by the previous Act. No statutory provision would have been requisite for that purpose, if the Lords of the Treasury had had the discretionary power now contended for. The recital speaks of persons "holding situations entitling them to have such allowances granted to them." Sect. 3 enacts that, from and after 5th July, 1822, no superannuation allowances shall be granted unless by the King in council, or the Treasury; and, by sect. 4, no such grant is to be made except under certain

[*980]

conditions *as to age, certificate of infirmity and services, or service performed to the satisfaction of the Lords of the Admiralty or Treasury, to be testified by their minute. Discretion being thus taken away as to granting allowances, it cannot be supposed to continue as to withholding them. Sect. 6 requires an account to be made up to every 5th of January, and laid before Parliament, of the total amount of superannuation allowances payable on the 5th of January preceding, the names of persons receiving such allowance who have died during the year, and the amount of allowance payable to every such person, and the name of every person to whom a superannuation allowance has been granted during the year, and the annual amount of such allowance. Sections 9 to 12, which provide for contributions to the superannuation fund, and for making certain stated deductions for the fund from all salaries in respect of which superannuation allowances may be granted, shew that the Legislature contemplated a vested right in the allowances. Where it is intended to give a discretionary power, that power is given in express words, as in the latter clause of sect. 14. It is true that, by stat. 5 Geo. IV. c. 104, the enactments of 3 Geo. IV. c. 113, as to deductions and contributions for a superannuation fund, are repealed, and it is ordered that the

(1) See stat. 4 & 5 Will. IV. c. 24.

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contributions already made shall be repaid; but that does not take away the vested right which the contributors had acquired in their allowances. The party now applying has, therefore, a legal right; and he has no remedy but by the present course. Unless his name be in some manner inserted in the estimates, his case cannot be considered by Parliament. It is the duty of the commissioners to make the minute; it is, incidentally, their duty to lay the name of the party before Parliament, though they may not be *compellable to add any statement of reasons. The grounds (as far as they appear) for the proceeding taken by the Treasury are in part such as the Court has already deemed insufficient for withholding the pension.

[*981]

(PATTESON, J. : We decided nothing in the former case respecting the title to this pension. We held only that the party was entitled to have a sum of money which the Lords Commissioners had admitted to be in their hands for his use.)

Sir John Campbell, Attorney-General, contended, in answer, that the statutes referred to were all in restraint of the power of the Crown to grant pensions; and the pensions granted by the Crown, before those statutes, were during pleasure, not for life. He also referred to *Gidley v. Lord Palmerston* (1).

LORD DENMAN, Ch. J. (stopping *Sir J. Campbell*) :

There is not the smallest foundation for this motion. The party applying should have shewn some words, in one of the statutes, requiring the Lords of the Treasury to do the particular acts insisted upon. But he has failed to point out any such words. It does not appear that the grant which it was resolved, by the minute of 1826, to lay before Parliament, was not altogether a grant during pleasure, and revocable the day after. If so, it would be absurd to require that the Board should recall that act of revocation in which they had exercised the discretion that belonged to them. The first branch of the rule before us is, that the Lords Commissioners should be called upon to restore to the minute book of the Treasury the minute of October 6th, 1826, expressing their opinion *that a vote should

[*982]

(1) 24 R. R. 668 (3 Brod. & B. 275).

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be submitted to Parliament for granting Mr. Smyth a retired allowance. For this no ground is laid. If the Lords Commissioners had an option then to decide whether or not a vote on this subject should be placed before Parliament, it is equally in their discretion now to say that, under present circumstances, no such vote shall be submitted. I do not say whether the Court has any power to issue a *mandamus* for the purpose of interfering with the books of the Treasury. Here, at any rate, it has not. The second branch of the rule is for calling on the Lords Commissioners to submit an application to Parliament for a grant on account of this pension, in the estimates for the present year. What power we have to call upon them to submit a vote to Parliament, I cannot see. I can draw no such inference in favour of the vested right which has been insisted upon, from the language of stat. 3 Geo. IV. c. 113. The superannuation allowance seems to me to be held on the same tenure as the office itself, namely, during pleasure. I cannot discover in the sixth section any ground for requiring this vote to be submitted. It enacts that the total amount of superannuation allowances shall be annually laid before Parliament; but that does not affect the question, what the amount shall be? It is not even required that the names of those entitled to allowances shall be annually submitted. The names of which the insertion is required are those of the persons, receiving allowances, who have died, and the persons to whom allowances have been granted, during the year. At all events this does not vary the tenure on which the allowance is held. We cannot say, because a person's name was once held fit to be submitted to Parliament for an allowance, that such allowance shall be submitted in the estimates now. *These reasons render it unnecessary to enter into more general considerations, which also might possibly furnish an answer to the present application.

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LITLEDAL, J. :

I am of opinion that there was no vested right in this case, and that the minute of 1826 left the Lords Commissioners at liberty, in a future year, to retain or to strike out the name of the party. And, even if they were compellable to restore the

minute, that would not accomplish the object contemplated, unless the party's name were submitted to Parliament, which must be done, if at all, under stat. 3 Geo. IV. c. 113, s. 6. But that section would not compel the Lords Commissioners to mention this party's name, even if the minute were restored. We have no authority to require that they shall submit the proposition suggested.

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PATTESON, J. :

The application is extraordinary; and the party has failed to lay any foundation for it. No clause of any Act has been cited, to shew that an allowance of this kind, once granted, is to continue for life. It is held by the same tenure as the office itself was, namely, during pleasure. And, if the minute conferring the pension did not give a vested interest, none could be acquired by contributing to the superannuation fund. As to the latter part of the motion, there is nothing to shew that the Lords Commissioners have not done all that is required of them by stat. 3 Geo. IV. c. 113, s. 6; and there is no pretence for calling upon them to make the proposed application to Parliament (1).

Rule discharged (2).

REX v. THE LORDS COMMISSIONERS OF THE TREASURY.

IN RE HAND, GENT., ONE, &C.

1835.
May 7.

[984]

(4 Adol. & Ellis, 984—998; S. C. 6 N. & M. 508; 2 H. & W. 67.)

Under stats. 50 Geo. III. c. 117, and 3 Geo. IV. c. 113 (3), the Lords of the Treasury were not authorised to grant retired allowances for life. A grant of such an allowance made by them in general terms was subject to the discretion of Parliament in voting the supplies from year to year, and was revocable by the Lords of the Treasury.

And, where the Lords, after granting an allowance on the abolition of an office, had revoked the grant, but the allowance had been erroneously inserted in the estimates of the year, voted by Parliament, and included in an Appropriation Act, this Court refused to enquire into the

- (1) Coleridge, J. had left the Court. annuation Act, 1834 (4 & 5 Will. IV. c. 24, s. 8).
(2) See the next two cases.
(3) Both repealed by the Super-

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propriety of the revocation, and would not grant a *mandamus* to the Lords for payment of the arrears, it being proved that the sum so voted had never come to their hands, and had been newly appropriated by a later Act of Parliament.

A RULE *nisi* was obtained in this term for a *mandamus*, calling upon the Lords Commissioners of the Treasury to issue a Treasury minute or authority to the Lords Commissioners of the Admiralty, the treasurer of the navy, or other proper officer, directing and authorising him or them to pay, or cause to be paid, to Robert Hand the arrears of his pension or retired allowance of 240*l.* per annum, from the 25th of December, 1832, to the 25th of March, 1836, as granted to him by the Lords Commissioners of the Admiralty.

By Mr. Hand's affidavit, it appeared that the office of sealer to the Great Seal was granted to him, subject to an existing life estate, by the Lord Chancellor, in 1801, and confirmed to him by patent, to be exercised by himself or by deputy, for his life; and that he entered upon the office, and into the receipt of the fees and emoluments, in 1810. In 1805, before the date of the patent, he was appointed clerk in the Navy Pay Office, an employment which required his constant attendance. The affidavit then mentioned the passing of stat. 3 Geo. IV. c. 113, "to amend an Act passed in the fiftieth year of his late Majesty, for directing that accounts of increase and diminution of public salaries, pensions and allowances should be annually laid before *Parliament, and for regulating and controlling the granting and paying such salaries, pensions and allowances;" and it set out sect. 1 of the Act, regulating the future amount of superannuation allowances, and several other sections (sects. 2 to 7, and sects. 10, 12, and 15), fixing the amount, &c., of such allowances, and establishing a fund for paying them, by contributions and deductions from salaries. The Navy Pay Office was one of the departments included (by schedule) in these provisions. The affidavit also referred to sects. 1 and 3 of stat. 5 Geo. IV. c. 104, which repealed the former enactments as to contribution from salaries, and directed that all contributions and deductions made under the previous Act should be refunded. None, however, had been made from Hand's salary. In August, 1832, the Lords of the Admiralty, having determined on placing several clerks of

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the Navy Pay Office, and among them Mr. Hand, on superannuation allowances, gave him notice that, in consequence of the consolidation of the civil departments of the navy, and the abolition of his office, his services were no longer required, and they had granted him "a pension of 240*l.* per annum." Hand ceased to be a clerk from the date of the notice. His full salary, till that time, was 400*l.* a year. In the navy estimates, laid before Parliament the next year (ordered to be printed, February, 1833), the pension granted to Hand was inserted under the head "Civil Pensions and Allowances," among "Pensions granted on Reduction of Office." It was stated as follows:—

	Served Years.	Pension.
" Robert Hand, clerk	27	£240.'

By an Appropriation Act, 3 & 4 Will. IV. c. 96, passed August 29th, 1833, it was enacted, in sect. 10 (which, *with others of the same Act, was referred to in the affidavit), that out of the supplies granted to his Majesty in the then session of Parliament there should be issued and applied any sum or sums of money, not exceeding 220,342*l.*, to defray the charge of civil pensions and allowances which should come in course of payment during the year ending March 31st, 1834. And, by sect. 20, that the supplies provided (as in the Act before mentioned), "shall not be issued and applied to any use, intent, or purpose whatsoever other than the uses, intents, and purposes before mentioned, or for the other payments directed to be satisfied thereout by any Act or Acts, or any particular clause or clauses for that purpose contained in any other Act or Acts of this session of Parliament." Hand received the pension from the time of his retiring from the Navy Pay Office till the discontinuance of the pension as after stated.

By stat. 1 & 2 Will. IV. c. 56 (1) ("to establish a Court in Bankruptcy"), the Lords of the Treasury were enabled (sect. 53) to grant compensation to certain officers of the Lord Chancellor and of the Court of Chancery, whose fees would be abolished by the operation of the Act. The office of sealer to the Great Seal, which Hand held then and at the time of the present application, was among those included in this enactment; and, in pursuance

(1) Repealed 32 & 33 Vict. c. 83, s. 20.

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of it, the Lords of the Treasury, by a minute of January 24th, 1833, awarded to Hand 449*l.* per annum so long as he should continue in office, the said annuity or compensation to commence from January 11th, 1832.

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In March, 1833, Hand received a letter, addressed to him by direction of the Lords of the Treasury, wherein, after noticing the last-mentioned grant, they stated that, advertng to the fact of his holding the said office of *sealer, amounting in emolument to 700*l.* per annum, they had thought proper to direct the Lords of the Admiralty to discontinue the annual payment of 240*l.* per annum made to him from the Navy Pay Office. From the date of that letter, Hand received no further payment on account of the last-mentioned annuity; and he now stated that he was informed, and believed, “that from time to time sufficient sums of money have been voted by Parliament to, and received by, Government, to be appropriated for the payment of civil pensions granted by the authority of the Government, out of which they could provide for and pay to him, this deponent, the arrears” of the last-mentioned annuity, “without prejudice to the other demands on the public service.” And that the pension of 449*l.* was granted for life without qualification, and solely as a compensation for the fees of which Hand was deprived by the establishment of the Court of Review.

On the 2nd of December, 1835, Hand presented a memorial to the Lords of the Treasury, praying that they would reconsider his claim, and order the arrears of his pension to be paid, and the payments continued for the future, or that they would refer the case to the law officers of the Crown. The answer was, that it did not rest with the Treasury Board to direct compliance with the prayer of the memorial for payment of the pension. Hand afterwards presented a memorial to the Lords of the Admiralty, stating the above facts, and ending with a similar prayer to the above. The answer was, that the Lords of the Admiralty did not admit the claim, and had no funds in their possession which they could legally apply to meet it.

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In opposition to the rule, Mr. Briggs, Accountant-General *of the Navy, deposed that it was part of his duty to prepare, for the purpose of being laid before Parliament, the estimates of monies

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required for the service of the naval department of the kingdom for each financial year, which is computed from March 31st: that in such estimates the amount of the sums voted in the estimates of the preceding year for superannuations and pensions is stated under their respective heads, and abatements made therefrom to the amount of such like allowances as, during the preceding year, have ceased to be payable, by death or otherwise: that in the account annually laid before Parliament, as required by stat. 2 Will. IV. c. 40, relating to the civil departments of the navy (s. 30), the balance is stated between the sum appropriated to each head of service for the preceding year, and the sum expended under such head of service, which balance is afterwards reported to the Lords of the Treasury, in order that it may be made available as part of the ways and means of the ensuing financial year: that the deponent was, by an order of the Lords of the Admiralty, dated August 2nd, 1832, directed to pay Hand the pension of 240*l.*; and that, by an order from them of February 1st, 1833, he was directed to cease paying it, and it was accordingly discontinued: that the estimates are prepared in January of each year, and that the account therein contained, of the amount of pensions which have ceased, is made up to the 31st of December preceding; and that consequently, notwithstanding the last-mentioned order, the amount of Hand's pension of 240*l.* was reckoned in the estimates for the financial year beginning April 1st, 1833, and was included in the vote of Parliament for that year; but that the pension has not been included in any subsequent *estimate, nor any money voted or appropriated by Parliament to answer it: and that, although sufficient money was appropriated for the payment of such pension from March 31st, 1833, to March 31st, 1834, yet the amount, being unpaid, formed part of the sum of 168,579*l.* which was placed at the disposal of the Lords of the Treasury in February, 1835, and became no longer available to or disposable by the Lords of the Admiralty. It was further sworn by one of the chief clerks of the Treasury, that, in February, 1835, the Lords of the Admiralty made their report to the Lords of the Treasury, recommending that 168,579*l.*, the savings of the grant for navy services of the year ended March 31st, 1834 (mentioned

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in Briggs's affidavit), should be appropriated as ways and means for the general public service: that, by direction of the Lords of the Treasury, in an account laid before Parliament, March 21st, 1835, to shew the amount of ways and means of former years which might be considered as savings, the last-mentioned sum was included under the head of grants for former years which it was supposed would not be required; and the sum was, with other monies, appropriated, by an Act of that session of Parliament, as part of the ways and means applicable to the public service of the year ending March 31st, 1836.

[After argument:]

[995] LORD DENMAN, Ch. J.:

I think that the case which we decided in last Michaelmas Term (1) does not apply here. *In that case the Lords of the Treasury had stated, from year to year, that they had received money on account of Mr. Smyth's pension, and that it was lying by them for his use. When he applied for it he was told that it could not be paid, unless upon conditions, which they had no right to impose if they merely held the money for the use of a party to whom it had been voted. All that the Court said there was, that the Lords of the Treasury must make a return, and shew why the money was not paid over. No decision was given on the point of law. If anything in the ruling of the Court was wrong, it might have been called in question afterwards. If the case in the Common Pleas, which has been referred to, was in Mr. Smyth's favour, we should have been glad to have our attention called to it on a return to the *mandamus*. I will only say further, as to the former case here, that the statement laid before us was such as made it imperative on the Lords of the Treasury to explain their refusal. In the present case we are driven to enquire whether the Lords of the Treasury had power to make a grant for life of the pension claimed. It appears to me that they could not; and therefore the foundation of the claim fails. The office was abolished by competent authority.

_(1) See p. 533, ante.

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The compensation was not made by way of bargain. The abolition was complete; and it was for the Lords of the Treasury to give an equitable compensation. It appears that they made a warrant for that purpose; and, if they had power to grant a pension for life, there might be ground for the position that they had done so; but I do not find anything in the Acts of Parliament to give them such a power. Mr. Hand was told, in August, 1832, that he would receive a pension in lieu of the emoluments of the office he then held; that is, that the amount of such *pension would be included in the estimates laid before Parliament in the following year. That was done; but early in 1833 it was revoked. We have no right to enquire whether there was reasonable ground for such a proceeding. He was in fact told that it would take place. The grant to him of 240*l.* was indeed included in the estimates for 1833-4, and voted by Parliament; but I think it has been satisfactorily explained that that was a mistake, that the sum did not enter into account as paid, and that the 240*l.* was altogether excluded from the estimates of the following year. And then it appears that an unappropriated amount, of which this formed part, was subsequently disposed of as part of the ways and means. There being no power to grant this pension for life, the vote of Parliament did not bind the Treasury to continue it, but only gave power to the Crown to do so: and the sum has now been voted to another purpose.

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LITTLEDALE, J. :

The Lords of the Treasury had no funds for this pension but such as might be voted by Parliament; they could only authorise a party to receive an allowance for life if such vote should pass, and so long as Parliament should continue such vote. As a pension, they had no power to grant it, nor funds to charge it upon. After they had made this grant, they for some reason thought proper to revoke it. The estimates were by that time made up; and, in consequence, this sum was included in the parliamentary grant for the year. But it is explained that the amount was afterwards thrown into the general fund applicable to other services, and never reached the Lords of the Treasury for the

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purpose in question. Under these circumstances we cannot grant a *mandamus*.

PATTESON, J. :

I am of the same opinion. I do not think we ought to enquire whether the Lords of the Treasury were right or not in revoking the warrant for this pension. There is nothing in the Acts of Parliament enabling them to grant a pension specifically for life. It is contended that a mere grant would operate to that extent by implication. Perhaps the Legislature contemplated that the allowances, when granted, would so continue ; but there is no enactment to that effect. The employment which this party had, as a clerk in the Navy Pay Office, was scarcely an office at all ; but, at any rate, we cannot say that, because a pension was granted in respect of it, that pension was for life. The pension was paid prospectively from August, 1832, and had been revoked before it was voted by Parliament. Even if the Lords of the Treasury had power to grant a pension for life, there was nothing in the circumstances of this grant to render it irrevocable. The appearance of Mr. Hand's name in the estimates for 1833-4, and the want of any statement on the subject in the later estimates, have been explained. And, if he was not entitled to claim this allowance for the year in which it was voted, *à fortiori* he cannot claim it for a subsequent year (1).

Rule discharged.

1836.
May 9.

[999]

EX PARTE SARAH EASTER RICKETTS, ADMINIS-
TRATRIX OF BEVAN.

(4 Adol. & Ellis, 999—1001 ; S. C. 6 N. & M. 523.)

Deductions having been made from a naval officer's half-pay in pursuance of a general order from the Admiralty, application was made on his behalf to have the amount of the deductions restored, and the Lords of the Admiralty stated, in answer, that they had given directions for restoring it. Afterwards they retracted this consent, giving as a reason that it would subject them to many similar applications. After the officer's death, his administratrix moved for a *mandamus* to the Lords of the Admiralty to restore the deducted sums, on the

(1) Coleridge, J. had left the Court.

ground that they had admitted the right to them and the possession of applicable funds.

Ex parte
RICKETTS.

Held, that there was no vested right in the half-pay, entitling the administratrix to a *mandamus*.

J. JERVIS in this Term (April 16th) moved (1) for a rule to shew cause why a *mandamus* should not issue calling on the Lords of the Admiralty to make an order for the payment of 394*l.* arrears of half-pay of Lieutenant Bevan, deceased, to his administratrix Sarah Easter Ricketts. It appeared by affidavit that, from 1818 to 1831, Lieutenant Bevan was on half-pay, and, having become lunatic, was maintained, under the direction of Government, in Haslar Hospital. From 1819 to 1831, a moiety of his half-pay was deducted, pursuant to an order from the Admiralty with reference to such cases. Applications were made by his relatives to have it restored, but without success. In June, 1831, the regulation established by the above order was discontinued, and the abatement on the half-pay reduced to 1*s.* 6*d.* per day. Lieutenant Bevan died in August, 1831. Mrs. Ricketts afterwards applied to the Lords of the Admiralty for a re-payment of the moiety of half-pay withheld from 1819 to 1831. This was at first refused; but, in answer to a subsequent application, the Secretary to the Admiralty wrote to Mrs. Ricketts's agent a letter, dated January 11th, 1832, *as follows : [*1000]

“SIR,—My Lords Commissioners of the Admiralty, having had under their further consideration the circumstances attending the late Lieutenant Bevan's case, command me to acquaint you that they have given directions to restore to his legal representatives the sum which may have been deducted from his half-pay since his first admission into the lunatic asylum at Haslar, over and above the abatement of 1*s.* 6*d.* a day which is now charged against the half-pay of officers received into the lunatic asylum. I am, &c.” Shortly afterwards, however, the agent received another letter dated January 20th, 1832, from the Secretary, in which he referred to his former letter as stating that the Lords of the Admiralty “had directed the Victualling Board to repay to the representatives of the late Lieutenant Bevan the amount of half-pay retained for his maintenance in the lunatic asylum

(1) Before Lord Denman, Ch. J., Patteson, and Coleridge, JJ.

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RICKETTS.

[*1001]

at Haslar ;” and he added that in consequence of a representation from the Victualling Board that the admission of this claim would bring forward ninety other claimants, the Lords of the Admiralty, though disposed, out of compassion, to make the payment, did not feel authorised, in such a case, to deviate from the established regulations. Mrs. Ricketts stated in her affidavit that she had received, through her agent, among other payments on Lieutenant Bevan’s account, one, about July, 1831, and another about July, 1832, which, as she was informed and believed, were in part satisfaction of the moiety of half-pay withheld as above mentioned (1). No other payment appeared to have been made on this account. *J. Jervis* contended that the affidavits shewed an admission on behalf of the *Lords of the Admiralty that they had the money claimed, and were bound to pay it ; and he urged that an officer’s claim to his half-pay was a legal right, on which a *mandamus* might be grounded.

(COLERIDGE, J. : Can it be said that there is a legal right in half-pay ? In *Flarty v. Odum* (2) it is called a voluntary donation.)

While the officer is on the half-pay list, there is a contract between him and Government. If not, whence does Government derive its right to call upon him for his services ?

(LORD DENMAN, Ch. J. : It does not appear to me at present that there is any legal claim ; but, before we decide upon the application, we will take time to ascertain what ground the right can be rested upon.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT :

At the time when this motion was made, we thought that there was no *prima facie* case, but considered it best to look further into the statutes. *Mr. Jervis* did full justice to his

(1) No further explanation was given as to these payments ; nor were they relied upon in the argu-

ment of counsel.

(2) 1 R. R. 791 (3 T. R. 681).

clients in presenting it to us; but we are of opinion that there is no pretence for saying that the half-pay was so vested as to entitle an administrator to call upon a public board to pay it over. There will therefore be no rule.

Ex parte
RICKETTS.

Rule refused.

JOHN SCOTT AND TWO OTHERS, EXECUTORS OF
F. SCOTT, DECEASED, *v.* BRIANT.

1836.

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(6 Nevile & Manning, 381—382; S. C. 2 H. & W. 54.)

In *sci. fu.* by executors to revive a judgment obtained by the testator, all who are named executors in the will may join, though one only has proved.

Executors derive their title from the will, and not from the probate.

SCI. FA. to revive a judgment obtained by the testator against the defendant. The plaintiffs made profert of the probate in the usual form (1). Plea: that the plaintiffs were not executors &c., in manner and form &c.; whereupon issue was joined. At the trial, it appeared that all the plaintiffs were appointed executors in and by the will, but that probate had been granted to John Scott alone, with a reservation of power to the others to come in and prove. *Mansel* contended, that inasmuch as probate had been granted to one of the plaintiffs only, the plea was sustained by the evidence. The learned Judge by whom the cause was tried, thought that the plaintiffs were rightly joined, and that the issue ought to be found for them. Verdict for the plaintiffs. *Mansel*, in the following Term, obtained a rule *nisi* to arrest the judgment, or for a nonsuit or new trial.

R. V. Richards now shewed cause:

In an action by executors, all who are named as such in the will must join, though some have not proved the will: *Brookes v. Stroud* (2), *Walters v. Pfeil* (3); and if they do not all join, the defendant may plead in abatement: 1 Wms. Saunders, 291, i;

(1) In *sci. fu.* by executors, the profert of probate is very commonly but incongruously inserted in the writ. The profert should be made in the declaration, after the allega-

tion of the defendant's appearance.

(2) 1 Salk. 3, cited in 1 Wms. Saund. 291, i.

(3) Moo. & Mal. 362.

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but where they are sued in their representative characters, it must be shewn that they have all acted. The plaintiffs are all of them executors by the will, though only one has proved.

Mansel, contra :

[*382] As probate was granted to one alone, he was the proper person to sue ; at all events it should have appeared from the profert that one only had proved, *and that power was reserved to the others to come in and prove.

(LORD DENMAN, Ch. J. : In Com. Dig. Pleader, (2 D 1,) it is laid down absolutely, that in an action by executors all must join, though some do not prove the will, but refuse before the ordinary.)

The plea being in this case that the plaintiffs were not executors, they should have been prepared to shew a complete title in all of them, which could only be by obtaining probate to all. These three persons jointly had no right to bring the probate into Court.

LORD DENMAN, Ch. J. :

There is nothing at all in this argument. The question is exactly the same, although issue is taken upon the fact of their being executors. The question is, whether they are executors ; and undoubtedly they are so.

LITLEDALE, J. :

The question is merely whether the plaintiffs are executors, as they describe themselves in the *sci. fa.* It appears to me that they are so. The will having gone into the Ecclesiastical Court, and having been there recognized by the granting of probate to one, all who are named in it as executors are acknowledged to be such. In Bro. Abr. Executors, pl. 27, there is this passage, " Debt by one executor. The defendant says that there is another executor alive, wherefore he prays judgment of the writ. The plaintiff says that he is discharged from the administration, and never administered. Nevertheless the writ was quashed, because he can administer when he pleases."

PATTERSON, J.:

Upon this issue the matter is quite clear. The fallacy of the argument consists in supposing that executors are made by the probate, whereas they are created by the will.

COLERIDGE, J. concurred.

Rule discharged.

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ICELY v. GREW.

(6 Nevile & Manning, 467—472.)

1836.

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Where, in a contract of sale entered into at an auction, one of several conditions is, that if the purchaser shall fail to comply with any of the conditions, the deposit shall be forfeited as liquidated damages; the condition forms no qualification of the general promise to complete the purchase.

Therefore upon a wrongful abandonment of the contract, on the part of the purchaser, the vendor may recover damages *ultra* the forfeited deposit; and is not bound to state this condition in declaring upon the contract.

ASSUMPSIT. The declaration stated, that the lease of a shop, and the good-will belonging to it, had been exposed to auction for the plaintiff by a certain person, being his auctioneer and agent, upon the following (amongst other) conditions of sale, viz.: That the highest bidder should be the purchaser; that the purchaser should pay immediately a deposit of 20*l.* per cent. in part of the purchase, and sign an agreement for payment of the remainder on or before the 25th March, 1834; and, in case of further delay in the completion of the purchase, from any cause whatever, the purchaser should pay 5 per cent. interest until payment, or the vendor should be entitled to the rents, at his option, but without prejudice to the vendor's rights under the last condition; that an abstract of the vendor's title, commencing with the lease under which the premises were held (1), should be

(1) But for this qualification the vendee would have been entitled to inspect the title of the lessor, in order to ascertain whether he had sufficient estate or power to create the term. See *Purvis v. Rayer*, 23 R. R. 707 (9 Price, 488, 520); *Deverell v. Lord Bolton*, 18 Ves. 505, 508, 512; *Fildes v. Hooker*, 2 Mer. 424; *Fune v. Spencer*, *Id.* 430, *u.*; *Ogilvie*

v. Foljambe, 17 R. R. 13 (3 Mer. 53); *Knatchbull v. Grueber*, 17 R. R. 35 (1 Madd. 153; 3 Mer. 124); *Spratt v. Jeffery*, 34 R. R. 387 (10 B. & C. 249; 5 Man. & Ry. 188); *Souter v. Drake*, 39 R. R. 715 (5 B. & Ad. 992; 3 N. & M. 40). [And see now the Vendor and Purchaser Act, 1874, s. 2, r. 1; Conveyancing Act, 1881, ss. 3 (1), 13.]

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delivered at his expense, and that upon payment of the purchase money the purchaser should have an assignment from the vendor, the expense whereof, and also the expense of all other things the purchaser might require, in deduction or confirmation of title, should be borne by such purchaser; that all outgoings would be cleared up to Christmas Day then last; that if any mistake should have been made in the description of the premises, or any error whatever should appear in the particulars, such mistake should not vitiate the sale, but a compensation (to be ascertained by arbitration) should be given: That the defendant was the highest bidder for, and became and was declared to be the purchaser *of the premises, at the sum of 7*l.*; and that thereupon in consideration &c. the defendant promised to perform and fulfil every thing in the said conditions of sale on his part, as such purchaser, to be performed and fulfilled; and although the defendant, in part performance of the conditions, did pay down 1*l.* 10*s.* as a deposit, and in part payment of the purchase money, and did sign an agreement for the payment of the remainder thereof, on or before the 25th March, 1834, pursuant to the conditions; and although the plaintiff did, at his expense, within a reasonable time, deliver to the defendant an abstract of his title to the premises, commencing as in the conditions mentioned; and although all outgoings in respect of the premises were duly cleared up to Christmas Day next preceding the sale; and although he the plaintiff, before and on the said 25th March, 1834, was always ready and willing to make, and did make appear to the defendant a good title, so as to enable him to assign the residue of the term in the premises to the defendant, and to execute proper assignments thereof to the defendant, and on the day and year last aforesaid offered to assign to the defendant, and to give him possession upon payment of the remainder of the purchase money; yet the defendant would not, on or before the said 25th March, 1834, on having such good title as aforesaid, or at any other time, pay to the plaintiff the remainder of the purchase money, or any part thereof, but wholly refused so to do, and wholly refused then or at any other time to complete the said purchase, or to accept the assignment of the said premises to him, or the possession thereof. By means whereof

the plaintiff hath not only lost all benefit and advantage which he might and otherwise would have derived from the completion of the said purchase, but hath incurred great charges and expenses in and about the sale, and in and about preparing an abstract of his title to the premises, and otherwise in relation thereto, and has been obliged to shut up the premises, and has lost the good-will.

Plea: *non assumpsit*.

At the trial before Lord Denman, Ch. J., at the London sittings after Michaelmas Term, 1884, the facts stated in the declaration were proved, and the conditions of sale were put in. In addition to the conditions set out, there was (amongst others that were not material) the following: "Lastly, if the purchaser shall neglect or fail to comply with any of the above conditions, the deposit shall be forfeited, as liquidated damages, to be retained by the vendors, who shall be at full liberty to rescind the contract, and resell the lot either by public or private sale, without the necessity of previously tendering a conveyance thereof to the defaulter; and the deficiency, if any, by the second sale, together with all charges attending the same, shall be made good by the defaulter." It was objected, that, under the above conditions of sale, the deposit of 20*l.* per cent. was to be retained by the vendor as liquidated damages, and in full satisfaction for a breach of the conditions by non-completion of the purchase; and that the last condition was a material qualification of the contract, and ought, therefore, to have been stated in the declaration. His Lordship overruled the objections, and the plaintiff had a verdict, damages 8*l.* (1). In the following Term,

(1) It does not appear whether, in assessing damages to this amount, the jury gave credit for the sum received as a deposit. But it would seem that upon the entire damages sustained by the vendor being ascertained, the purchaser would be entitled to have the amount of the deposit recouped from such entire damages; as otherwise, the vendor either would be twice recompensed for that part of the breach of contract which corresponded with a

breach of the conditions, or would receive a positive bonus in that which the parties treated merely as a liquidated indemnification.

Where in an assise of rent it was pleaded and found that the demandant had disseised the tenant of the land, the value of the land, during the disseisin, was recouped out of the damages assessed for the arrears of the rent: 8 Ass. fo. 20, pl. 37.

So, where, after the death of the husband, a stranger entered by abate-

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Addison, in pursuance *of leave reserved, obtained a rule *nisi* to enter a verdict for the defendant or for a nonsuit.

Sir W. W. Follett now shewed cause, and contended, that the whole contract being broken, the plaintiff had a right to sue for general damages.

Addison, contra :

This condition ought to have been stated in the declaration ; it forms a material qualification of the contract, and therefore the

ment, (*qu.* by disseisin, as the heir appears not to have been entitled) and endowed the wife,—in an assise against the abator and the wife, by the feoffee of the husband, the demandant recovered two thirds and damages against the abator, but the wife retained her third, (which had been assigned to her without collusion,) and one third part of the damages was recouped : 12 Ass. fo. 35, pl. 20.

So in a case where the Prior of St. John of Jerusalem in England recovered in assise, the jury assessed no damages, because they found that the tenant had built and repaired : 14 Ass. fo. 41, pl. 12.

Where A. leased to B. for life, and afterwards disseised B., who brought an assise of novel disseisin against A., it was held, that the rent which occurred during the disseisin ought to be recouped from the damages, but not that which had occurred before the disseisin : T. 9 Edw. III., fo. 8, pl. 21 ; S. P. per *Reeve, arguendo*, T. 4 Hen. VII., fo. 11.

So in assise, in the King's Bench, for house and land at Stepney, the jury found only 40*s.* damages because the houses were well sustained, and the land had been sown : P. 24 Edw. III., fo. 49, pl. 35. (The finding of the jury assumed that the emblements would belong to the demandant. And as the Court acquiesced in the view taken by the jury, this

case is cited by Lord BROOKE as an authority to shew that upon a judgment in assise the demandant is entitled to emblements : Emblements, pl. 11.)

Where, in an assise of land, the demandant recovered the land, but the tenant shewed that he had a rent charge issuing out of the land (or a right of common over it,) the value of such rent charge (or common) was recouped out of the damages to be recovered in the assise : Fitz. Abr. M. 3 Hen. VI., tit. Damage, pl. 18. And see *Sands v. Peckham*, M. 4 Hen. VII., fo. 14.

So in *Dyer*, 26, it is said, “ If a man disseise me of land, out of which a rent charge is issuing, which has been in arrear for several years, and the disseisor pay these arrears, if (1) the disseisee recover in assise, the rent paid by the disseisor shall be recouped in the damages. And see *Warner's case*, M. 33 Hen. VI., fo. 4, pl. 23 ; *Coulter's case*, 5 Co. Rep. 30 b, third resolution ; *Ireland v. Coulter*, Cro. Eliz. 631.

So an executor *de son tort*, if sued in trover by the rightful executor, cannot plead payment of debts of the testator to the value of the goods converted ; or that he has given the goods to creditors in satisfaction of their debts, inasmuch as against the rightful executor he has no authority so to do ; yet he may have the benefit of these payments by way

omission to set it out creates a variance, which may be taken advantage of under *non assumpsit*, because the plaintiff fails to prove a contract such as that laid in the declaration. If the Court be of opinion that the condition forms a material qualification of the contract, the defendant is entitled to a nonsuit.

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But it is submitted also, that the defendant is entitled to have the verdict entered for him. The effect of the condition is, in fact, to limit the damages for a breach of the contract, to the amount of the deposit paid. If a carrier gives notice that he will not be liable to a greater extent than 5*l.*, and a party seeing the notice employs the carrier to carry goods of greater value, the damages are, in case of a loss of the goods, limited to 5*l.* : *Clarke v. Gray* (1).

(PATTESON, J. : The breach stated in this declaration is not in terms a breach of any of the conditions,—it is a breach of the contract. The object of this condition seems to be to secure the performance of the particular things specified in the other conditions.)

The whole contract arises from the party's being the highest bidder, upon those conditions. The highest bidder is, by the conditions, to be the purchaser. The breach stated is a breach of that condition.

LORD DENMAN, Ch. J. :

It is not meant, by this condition, that the deposit shall be regarded as liquidated damages as *against a party who breaks

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of recouper: *Whitehall v. Squire*, Carthew, 103. And see *Mountford v. Gibson*, 7 R. R. 599 (4 East, 441; 1 Smith, 129); *Kist v. Atkinson*, 11 R. R. 664 (2 Camp. 63); *Bamford v. Harris*, 1 Stark. 343; *Le Loir v. Bristow*, 4 Camp. 134.

Formerly there could be no deduction by way of recouper unless the subject-matter of recouper were found by the verdict: Bro. Abr. tit. Damages, pl. 7. And see *Ibid.* pl. 94, 96, 99. But in *Plevin v. Henshall*, 10 Bing. 24; 3 Moore & Scott, 402;

2 Dowl. P. C. 743, it was held by the Court of C. P. that where a verdict in trover has been obtained against a party, who has since been compelled to pay rent due from the plaintiff in respect of the premises where the goods were taken, the execution upon the judgment in trover may be limited to the excess of the verdict beyond the amount of rent paid, on an application in the nature of an *audita querela*.

(1) 6 East, 564; 2 Smith, 623.

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off altogether. It is intended to be so only in case of a breach of any of the particular conditions.

LITLEDALE, J.:

I think that the plaintiff is entitled to sue the defendant for general damages.

Et per CURIAM:

Rule discharged.

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(6 Nevile & Manning, 494—505; S. C. 5 L. J. (N. S.) K. B. 158.)

Where a lord of a manor bound by tenure to repair, has repaired a bridge, he may, in an action of *assumpsit*, recover contribution from a person who holds lands which were parcel of the demesnes at any time whilst the manor was so charged, in proportion to the value of the lands so held.

A survey taken by commission from the Crown, when seised of a manor, is admissible evidence to shew what were the demesne lands of the manor at that time.

ASSUMPSIT. The declaration stated, that there now is, and from time whereof, &c., there hath been a certain public and common bridge in the parish of Rickmansworth, otherwise Rickmersworth, in the liberty of Saint-Alban, in the county of Hertford, over the River Colne, commonly called Batchworth Bridge, situate in the King's common highway leading from the town of Rickmansworth to London, for all the liege subjects of the King and his predecessors to go, &c.; and that divers persons respectively, by reason of their tenure (1) of divers lands within the said *manor,

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(1) *Ratione tenuræ suæ* implies an immemorial liability in respect of the lands holden: *Prior of Stokebridge's* case, M. 44 E. 3, fo. 31, pl. 13 (for repair of Stokebridge, in the county of Cambridge); M. 5 Hen. VII., fo. 3, pl. 8; M. 8 Hen. VII., fo. 5, pl. 2. If a man is bound to repair a way, *ratione tenuræ talis terræ*, no title by prescription need be alleged, because prescription is implied: T. 19 Hen. VII., Keilwey, 52. But an allegation that the party is liable *ratione tenementi* is not sufficient, without going on to allege a

prescriptive obligation; because *tenementum* is no more than *messuagium* or *terra*, and does not point out the duration of the holding, as the word "tenura" does: Styles' Rep. 400. And therefore where the liability to repair is by reason of inhabitancy (*ratione residentiarum*), a prescriptive liability must be alleged: Keilwey, 52, *per totam curiam*. However in *Rex et Regina v. Buckeridge*, 4 Mod. 48, upon an information for not repairing a highway *ratione tenuræ*, the evidence was, that the Empress Matilda gave certain lands to the

in the liberty and county aforesaid, during all the time aforesaid, were, and still are, bound to repair the said bridge as often as, and whenever it hath and may be necessary; and on 1st of January, 1832, and for a long time *afterwards, the said bridge became ruinous, and out of repair, and without any sufficient parapet on the sides thereof; that before and at the time when the said bridge was so out of repair, and continually from thence hitherto, the plaintiff and the defendant, and divers other persons, by reason of their tenure of the said lands within the said parish respectively; that is to say, the plaintiff, by reason of his tenure of divers, to wit, two hundred acres of land, the defendant, by reason of her tenure of divers, to wit, two hundred and fifty acres of land, other part thereof; and thirteen other persons, by reason of their tenure of the residue of the said lands, being divers, to wit, one thousand acres, were and still are bound to repair the said bridge; and the said bridge being so

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Abbess of Barking to repair the way; that the Abbess &c. sold those lands to the Abbot of Stratford, who by the consent of his convent charged all his lands for the repair of the way; and thus it stood till the Dissolution &c., and then all the lands of the Abbot of Stratford being vested in the Crown, were granted to Sir Peter Mewtis, who held them charged for repairing the way; and that from him by several mesne conveyances they came to the defendants. But it was said for the defendants, that no lands shall be chargeable for the repairing this highway *ratime tenuræ*, but such as were originally given for that purpose; and so the defendants could not be guilty, unless it was proved that they had some of those lands in possession which were given by the Empress to the Abbess of Barking, and that no other lands formerly belonging to the Abbot of Stratford were liable but those bought of the Abbess. The Court was of opinion, that upon this evidence all the lands of the Abbot were liable to repair this way, and directed the

jury accordingly. It does not appear from this report whether the Abbot of Stratford charged the other lands before or after the time of legal memory. Nor does it appear how the question could have arisen,—as it is stated that all the lands of the Abbot (including therefore those given by the Empress) came to the defendants. The Empress died in 1167; the coronation of her grandson Richard I. (which is the period of legal memory) took place in 1189.

So, *consuevit* imports the existence of an usage time out of mind: *Rosewell v. Prior*, 2 Salk. 459.

But in an indictment for not repairing a house, whereby it has become ruinous and dangerous to the highway, mere possession is sufficient to charge the party: *Regina v. Watts*, 1 Salk. 357. And see 2 Inst. 700; *Rex v. Kerrison*, 14 R. B. 491 (1 M. & S. 435); *Bac. Abr. Highway* (F). In 2 Wms. Saund. 158 d, n., this is treated not as a case of nuisance, but as a case of liability to repair *ratione occupationis* instead of *ratione tenuræ*.

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out of repair, and the plaintiff and defendant, and such other persons, being so liable as aforesaid, he the plaintiff, by reason of such his tenure, heretofore, on 1st August, 1833, was called upon, and forced and obliged to repair, and did repair the said bridge; and in so doing, and upon occasion of the premises, and incidentally thereto, necessarily incurred and sustained divers charges and expenses of his moneys, amounting, &c.; that by reason of the premises, the defendant then became liable to contribute towards the said charges and expenses, and in respect thereof to pay to the plaintiff a certain sum of money, being her proportional part of the charges and expenses so incurred and sustained by the plaintiff upon the occasion and for the purposes aforesaid, in reference to the value and extent of the lands so in the tenure of the defendant as aforesaid; of all which premises the defendant then had notice, and being so liable, the defendant, in consideration, &c., promised the plaintiff to pay him 300*l.* on request. Second count, upon an account stated.

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The defendant pleaded,—1st, *Non assumpsit*; and secondly, to the first count, that she was not at the time when &c., nor is she now, by reason of the tenure of the lands mentioned in the first count of the declaration, or of any part thereof, bound to repair the said bridge in the said count mentioned, *together with the plaintiff and the said other persons, as in that count mentioned or referred to; concluding to the country (1).

At the trial before Lord Denman, Ch. J., at the Hertfordshire Spring Assizes, 1835, the following facts appeared:

In 1785, and from thence until his death in 1813, Henry Fotherby Whitfield, Esq. was seised in fee of the manor of Rickmansworth, together with about 700 acres of land, including Rickmansworth Park, since purchased by the defendant. In 1830, William Windall purchased the manor under a title derived under the will of the late Mr. Whitfield, and immediately mortgaged in fee to Seekamp, who in 1831 assigned the mortgage

(1) The second plea puts in issue the liability of the land to the burthen, and attempts to involve in that issue the defendant's seisin of the land; but it would rather appear

that the defendant was entitled to this advantage in consequence of the manner in which both propositions are mixed up in the declaration.

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to the plaintiff. In 1832, an indictment for the non-repair of Batchworth Bridge (mentioned in the declaration) was found against Mr. Windall. This indictment contained two counts, in the first of which Mr. Windall was charged with liability to repair *ratione tenuræ suæ* of certain lands within the parish of Rickmansworth; and the second with liability *ratione tenuræ suæ* of the manor of Rickmansworth, and of the wastes, commons, and rights of the said manor. Upon this indictment Mr. Windall was found guilty generally. The bridge, being in a ruinous state, was immediately afterwards rebuilt by the plaintiff at an expense of 1,000*l.*, after which this action was commenced by him to recover contribution from the defendant in respect of her tenure of Rickmansworth Park, which, or a part of which, was alleged to have been formerly parcel of the demesnes of the manor. A record of a conviction in 1785 of H. F. Whitfield, for the non-repair of Batchworth Bridge, was put in and read. By the first count of the indictment Mr. Whitfield was charged with being liable to repair *ratione *tenuræ* of certain lands, and by the second with general personal liability. Upon this indictment, Mr. Whitfield was found guilty generally. The bridge was immediately afterwards put in thorough repair by Mr. Whitfield, and all necessary reparations were from time to time made at his expense. Since the death of Mr. Whitfield repairs had been done to the bridge by a Mr. Williams, who had purchased the manor from the trustees under the will of Mr. Whitfield. In order to shew that the lands comprised in Rickmansworth Park were formerly demesne lands of the manor, the following documents were put in: first, a survey made in the reign of Jac. I., under a royal commission directed out of the Exchequer, by an extract from which it appeared that the manor of Rickmansworth, with the capital mansion and lands (which were described,) were held under a lease (by letters patent) from the Crown; secondly, a lease dated in Dec. 1685, by which John Fotherby, Esq. then lord of the manor of Rickmansworth, granted the manor with the capital mansion “and all those closes of arable land, meadow, pasture and wood ground, thereunto belonging or therewith used, commonly called or known by the names of, &c.” (here followed the names of many closes)

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“ which said closes and parcels of land, meadow, and pasture, are now impaled in and lately made a parke.” Of the closes described in this lease as lately made into a park, four principal ones, containing 102 acres, were amongst those described in the survey above mentioned. It was contended on the part of the plaintiff, that these documents proved that the park, of which the defendant is now the owner and occupier, was formerly a portion of the demesnes of the manor, and that, consequently, a liability on her part to contribute to the expenses of repairing the bridge was established. For the defendant, on the other hand, it had been objected, that the survey was not admissible evidence; and it was contended, that without such survey, it was not satisfactorily proved that any portion of the defendant’s lands were formerly portion of the demesne lands, and that were that fact proved, it was rather to be inferred from the evidence that the liability of the lord of *the manor to repair was in respect of the manor with the wastes, commons, rights, &c. than in respect of his tenure of the demesne lands. Lord DENMAN, Ch. J., in addressing the jury, told them that the question was, whether the defendant held any of that to the tenure of which the liability to repair originally attached; and directed them, that if they were satisfied that when Whitfield was indicted, it was in respect of all he then held, including the manor and including the defendant’s lands, they must find for the plaintiff; but that if they thought that he was indicted and convicted as lord of the manor only, were not satisfied that the defendant’s lands were *part of the lands to which the liability attached, they ought to find for the defendant. The jury found for the defendant, and said that they thought the liability was in respect of the manor only. His Lordship gave *Thesiger* leave to move to enter a verdict for 220*l.* (which amount was agreed upon between the parties) if the Court should be of opinion that by reason of the evidence given of the survey in the reign of Jac. I., and the mention there made of part of the lands now in the defendant’s holding, the jury ought to have been directed to find for the plaintiff, although Mr. Whitfield was liable only as lord of the manor. In Easter Term a rule *nisi* was obtained by *Thesiger*, against which

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Channell now shewed cause :

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The survey made in the reign of James I., which was put in to shew what the demesne lands were, was not admissible in evidence.

Supposing that the survey was admissible, it did not shew that the defendant's lands were ever part of the demesne lands of the manor. Besides it is possible that the demesne lands may have been severed from the manor, and conveyed away by the Crown, before the liability to repair attached, and they may, after the manor has become liable, have been repurchased by a subject into whose hands the manor had in the meantime come. In that case, the lands, though they had formerly been demesne lands, would not be liable to contribute towards the repairs of the bridge. There was nothing in the evidence to negative that supposition, and the plaintiff is bound to make out a complete *case.

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(LORD DENMAN, Ch. J. : That supposes two conveyances to have been made, of which we have no evidence.)

Assuming, however, that it was shewn that the defendant's lands were anciently part of the demesne lands, it was incumbent on the plaintiff to make out the proportion in which, and the persons with whom, she was jointly liable. This resembles an action brought by one surety against another (1). The declaration says that the defendant is liable with thirteen others ; the plea of the defendant is, that she is not liable with the plaintiff and the others.

(COLERIDGE, J. : Has the verdict negated the liability of the thirteen ?)

It has negated the liability of all who do not hold demesne lands, and no proof was given that any other than the defendant was the owner of demesne lands.

(LITLEDALE, J. : Suppose the demesne lands consisted of

(1) A liability *ratione tenure* memory (1189). Here the survey imports (*ante*, 558, *u.*) a liability shews the land in question to have attaching before the time of legal been parcel of the demesnes in 1603.

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1,000 acres, and it was shewn you were in possession of 100 acres, would not that make a *prima facie* case against you?)

In that case it would be incumbent on the plaintiff to shew who were in possession of the 900 acres.

Thesiger, in support of the rule :

At the trial there was no question as to the extent of the defendant's liability ; for the amount was matter of arrangement. The defendant is not bound by the issue on the record to shew that thirteen persons besides the defendant were liable. It is sufficient to prove that the defendant is liable with any of the thirteen.

The liability to repair attaches upon the demesne lands. It is said that it may be presumed that the demesne lands had been aliened before the liability attached, and that these lands had been re-conveyed to the lord of the manor for the time being. There should be some ground for the Court to make such a presumption. But by the evidence the liability is fixed on the demesne lands and attaches to every part. The defendant is shewn in the possession of a portion, and the liability to contribution attaches to her. (Here he was stopped by the COURT.)

[502] LORD DENMAN, Ch. J. :

There is no doubt raised in this case. The manor and demesne lands were in the hands of the Crown in the time of James I., and subsequently in the hands of Mr. Whitfield. The jury have found that Mr. Whitfield was liable to repair the bridge, in respect of the manor of Rickmansworth, and not in respect of other lands held by him. Mrs. Arden is shewn to hold some of the demesne lands. She is therefore liable to contribute to the repairs of the bridge, in the proportion which her portion of the demesne lands bears to the whole. The proportion is the only matter which gives rise to any doubt; and that was arranged between the parties.

LITTLEDALE, J. :

The survey was in my opinion admissible in evidence. It

shews that the lands mentioned in it are part of the demesne lands of the manor.

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The plaintiff has been found liable to repair the bridge as lord of the manor. It is clear that if the plaintiff be liable as lord of the manor, and any part of the demesne lands be alienated, and in the hands of others, he may call upon them for contribution.

In the absence of evidence, as to any other party being liable to contribute jointly with the defendant, the presumption would be that the defendant only was liable. Evidence has however been given that the defendant and some others are liable. No doubt the plaintiff cannot say in general terms, that A. is the owner of some portion of the demesne lands, and B. of some other portion, and that therefore they are liable to contribute. But the parties appear to have come to some arrangement on that subject.

There is no ground to presume that the lands were aliened before the liability to repair attached.

PATTESON, J. :

The survey was clearly admissible in evidence. It professes to be a survey made on the 2nd of July, in the third year of the reign of James I., by virtue of a commission of the King out of the Exchequer, on the oaths of the tenants.

The manor of Rickmansworth was at that time in the hands of the lessee of the Crown ; and it distinctly appears that portions of the land now held by the defendant were parcel of the demesne lands of that manor. It is admitted that if it be proved that the defendant's lands were demesne lands, and that the liability to repair attached before that portion of the demesne lands was separated from the manor, the defendant is liable to contribute. But it is said there is no evidence that in 1606, there was any liability on the owner of the manor to repair ; and it is said that the demesne lands may have been severed from the manor by a grant from the Crown, and that afterwards the manor may have been granted, and the liability to repair imposed upon the manor, and that subsequently the person to whom the manor was granted might have purchased the demesnes. There is no ground for any such supposition. The evidence given tends to a contrary presumption. It is shewn by the evidence that the

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manor and demesnes were unsevered, and in the hands of the Crown in 1606, and also that they were in the hands of Mr. Whitfield in 1785. When the liability to repair is first heard of the manor and demesnes were unsevered. How then can it be presumed that the liability to repair was imposed when they were severed.

The only remaining objection is as to the *amount* which the defendant is liable to contribute. There is great difficulty with respect to the evidence on this subject. In an action for contribution for repairs which have been made, it is necessary to shew the whole of the lands liable to contribute, so that the proportion of each party may be ascertained. In the present case it appears that the amount of contribution has been made matter of arrangement.

COLERIDGE, J. :

I felt for some time pressed with the difficulty which my brother PATTESON has stated,—the insufficiency of the evidence with regard to the *amount* of the defendant's liability to contribute. From the way in which the motion comes before us we must suppose that *the sum agreed upon is the proper sum, provided what is necessary for maintaining the action be made out.

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First, then, upon the evidence, did the defendant possess part of the demesne lands of the manor? Next, were the defendant's lands part of the demesne lands when the liability to repair was imposed? That they were part of the demesne lands, there cannot, I think, be a doubt.

I do not think any lawyer can doubt that the survey was evidence. No preliminary objection was made to its admission. It was acquiesced in as being what it professed to be—a survey of the manor of Rickmansworth and its demesnes. I have always understood that documents of this kind are admissible in evidence. If admissible, they are admissible to prove what is stated in them—that certain lands were parcel of the demesne lands of the manor.

Then the only remaining question is, whether the lands of the defendant were part of the demesne lands at the time when the liability to repair was first imposed upon the manor? Can

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any one make the presumption which *Mr. Channell* asked the Court to make,—that at some previous period the demesne lands had been separated from the manor, and that whilst the severance existed the liability to repair attached? The manor and the demesnes are unsevered in the hands of the Crown; and they are so subsequently in the hands of *Mr. Whitfield*. To make the required presumption would be to contradict all the facts of the case.

Rule absolute (1).

CHARLES SCHOFIELD, AND ELIZABETH, HIS WIFE,
ADMINISTRATRIX, &c. OF LANE, DECEASED, *v.* CORBETT (2).

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(6 *Nevile & Manning*, 527—528; S. C. 11 Q. B. 779, *n.*)

A debt due from the testator cannot be set off in an action for money had and received to the use of the plaintiff as executor.

ASSUMPSIT. The declaration stated that the defendant was indebted to *Charles Schofield*, and *Elizabeth*, his wife, as administratrix (with the will annexed) of *Thomas Lane*, deceased, in 80*l.*, for money received by the defendant, for the use of the said *Charles*, and *Elizabeth*, his wife, as administratrix as aforesaid, and in 80*l.* for money found to be due from the defendant, to the said *Charles*, and *Elizabeth*, his wife, as

(1) If a man bound by tenure of land to repair, alien part of the land to A. and part to B., A. may be charged with the whole repair. *Case de Loddon Bridge*, in *Itinere Wyndsor*, Sir W. Jones, 273. But A. shall have contribution against B. by a writ *de onerando pro ratâ portione*, *Registrum Brevium*, 268, a; F. N. B. 235, B; 2 Inst. 700; *Hardres*, 131; *Danvers*, Abr. 744; Com. Dig. tit. *Chimin* (B 2); Bac. Abr. tit. *Highway* (F).

Though the lord of a manor bound to repair a bridge or highway *ratione tenuræ*, may, upon separate alienations of several parcels, have agreed to discharge those that purchase of him, that will not alter the remedy

for the public, but will only bind the lord and those that claim under him; and no *act of the proprietor will so apportion the charge as that the remedy for the public benefit should be made more difficult. And though a manor subject to such charge come into the hands of the Crown, yet the duty continues upon it, and any person claiming afterwards under the Crown the whole manor, or any part of it, will be liable to an indictment or information for want of due repairs: *Regina v. Duchess of Buccleugh*, 1 Salk. 358.

(2) Cited by COLERIDGE, J. in *Rees v. Watts* (Ex. Ch. 1855), 11 Ex. 410, 25 L. J. Ex. 30, 32.—R. C.

[*505, *n.*]

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administratrix as aforesaid, on an account stated between the said defendant, and Charles and Elizabeth, as administratrix as aforesaid: And that the defendant promised the said Charles and Elizabeth, as administratrix as aforesaid, to pay them, &c.

Plea; first, *non assumpsit*; secondly, a set-off of a debt due from the testator, Thomas Lane, in his lifetime.

Special demurrer to the second plea, stating for cause that it appears from the said declaration that the plaintiffs seek to recover in this action moneys accruing due to them the said Charles, and Elizabeth, his wife, as administratrix as aforesaid, after the death of the said Thomas Lane, and found the said action on the breaches of promise in that behalf made to them the said Charles, and Elizabeth, his wife, as administratrix as aforesaid, after the death of the said Thomas Lane; and yet the defendant hath in and by his last plea attempted to set off against such moneys, and damages, and causes of action, alleged debts stated to have been contracted by the said Thomas Lane in his lifetime, and which cannot be set off against the moneys, damages, and causes of action mentioned in the declaration. Joinder in demurrer.

[*528] *Ball*, in support of the demurrer, referred to *Shipman v. Thompson* (1), *Kilvington v. Stevenson* (2), *Tegetmeyer* and *another, executors, v. *Lumley* (2), and was stopped by Lord DENMAN, Ch. J., who asked *Sir William Follett* if he could get over these authorities.

Sir W. W. Follett, in support of the plea :

This is an action for money had and received, which may have belonged to the testator in his lifetime, and is therefore distinguishable from *Kilvington v. Stevenson*, which was an action by an executor for goods sold by him after the death of the testator, there being in that case an immediate contract with the executor himself; and from the case of *Tegetmeyer v. Lumley*, which was covenant for rent accrued due after the testator's death.

(PATTESON, J. : The words of the Act of Parliament, 2 Geo. II.

(1) Willes, 103.

(2) Willes, 264, *in notis*.

c. 22, s. 13 (1), are, "where there are mutual debts between the plaintiff and defendant, or, if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other," &c. Here the debt claimed does not appear to be a debt due to the testator. The administratrix here says that the defendant has had and received money to her use.

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LORD DENMAN, Ch. J.: There was no debt due from the defendant to the intestate, as far as we know from this record.)

It must be taken that the plaintiffs were bound to sue in their representative character; and a debt due to them in that character only, must, it is submitted, come within the meaning of the enactment. The money recovered would be assets in the hands of the plaintiffs.

(PATTESON, J.: In that respect the case does not differ from *Shipman v. Thompson*.)

Et per CURIAM :

Judgment for the plaintiff.

IN THE COURT OF COMMON PLEAS.

STANLEY v. TOWGOOD AND OTHERS, EXECUTRIX AND
EXECUTORS OF TOWGOOD (2).

1836.
May 24.

(3 Bing. N. C. 4—10; S. C. 3 Scott, 313; 2 Hodges, 132; 6 L. J. (N. S.)
C. P. 129.)

[4]

A covenant to keep and leave a house in repair, is satisfied by keeping it in substantial repair, according to the nature of the building; and with a view to determine the relative sufficiency of the repair, the jury may inquire whether the house were new or old at the time of the demise.

The plaintiff sued on the following covenant contained in an indenture, whereby the plaintiff had demised to the defendants'

(1) Repealed 46 & 47 Vict. c. 49. N. C. 451; *Payne v. Hayne* (1847)
But see now R. S. C., Ord. XIX., 16 M. & W. 541; 16 L. J. Ex. 130;
r. 3.—B. C. and in *Proudfoot v. Hart* (1890) 25

(2) See the same principle applied Q. B. Div. 42, 59 L. J. Q. B. 389.—
in *Mantz v. Goring* (1838) 4 Bing. B. C.

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[*5]

testator a messuage, with the *appurtenances, for fourteen years, from Michaelmas, 1828 : The said testator "shall and will, during the continuance of this demise, preserve and keep, and at the end or other sooner determination of the said term of fourteen years hereby granted, leave the said demised messuage and other buildings, and all the outhouses, offices, windows, doors, drains, sewers, pipes, and other water-courses, gates, hedges, and fences belonging to, in, or about the said demised premises, in good and tenantable order and repair, all losses and damages by fire or tempest in the mean time excepted."

Breach, that testator, while possessed of the premises, and thence until the commencement of this suit, suffered and permitted the said demised premises to be and continue, and the same were for and during all that time ruinous, prostrate, broken, fallen down, choked, foul, miry, out of repair, and in great decay for want of needful and necessary maintaining, upholding, supporting, and keeping the same, although the dilapidation was not, nor was any part thereof, occasioned by fire or tempest, contrary to the form and effect of the said indenture, and of the covenant so made by testator.

Plea, that testator in his lifetime, and defendants as executrix and executors, since, have, and each hath, during the continuance of the demise, preserved and kept the said demised premises in good and tenantable order and repair, according to the form and effect of the said indenture.

It appeared at the trial that the house in question was an old house ; and even according to the testimony of the defendants' witnesses repairs were wanted to a small amount ; but the defendants proposing to shew in detail what was the state of the house and fences at the time of the demise, BOLLAND, B., who presided at the trial, rejected evidence to that effect, as irrelevant under this issue.

[6]

During the term, the lessee had erected a lean-to with a roof of very imperfect construction : the rain penetrated through ; but the roof was not shewn to be in a worse condition at the time of the action, than at the time of erection ; and it was contended, on the part of the defendants, that the lessee was not bound to leave it in a better condition than when it was

originally constructed. BOLLAND, B., directed the jury that the lessee being bound by his covenant to keep and leave the house in repair, it was immaterial whether at the time of the demise it were a new or an old house; and that the lessee was bound to leave the lean-to in substantial repair.

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A verdict was found for the plaintiff, damages 14*l.* 10*s.*, with leave for the defendants to move to reduce the amount to 8*l.* 10*s.*, if the defendants were not bound to leave the lean-to in substantial repair.

Storks, Serjt., moved to reduce the damages accordingly, on the ground that the lessee was not bound to leave the lean-to erected by himself in better condition than when it was first constructed; and for a new trial, on the ground that the jury had been misdirected. The measure of repairs must depend on the nature of the premises, and a lessee could not, under a covenant to repair, be called on to leave an old house in as good a condition as a new one. A rule *nisi* having been granted,

Kelly and *Gunning* shewed cause:

As the lessee was under covenant to keep and leave the premises in repair, the state of repair they were in at the time of the demise was immaterial: it often happens that a house is let for a lower rent, in order to the tenant's putting it in complete repair. The language ascribed to the learned Baron, in summing-up, if employed by him, could only have been used in illustration of the position, that, by a covenant such as this, the lessee is bound to put the *premises in complete repair, whatever may have been their condition at the time of the demise.

[*7]

With respect to the lean-to, the lessee was bound at least to leave it in tenantable repair: a roof which fails to exclude the rain can never be deemed sufficient under a covenant to keep in repair. In *Bac. Abr. Covenant, F.*, it is laid down, "If a man takes a lease of a house and land, and covenants to leave the demised premises in good repair at the end of the term, and he erects a messuage upon part of the land, besides what was before, he must keep or leave this in good repair also." In

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Harris v. Jones (1) it was held, that under a general covenant to repair the lessee must keep the premises in substantial repair; although a literal performance of the covenant was not to be required.

Storks and *B. Andrews* in support of the rule :

[*8]

If the lean-to was not in tenantable repair, that was owing to the vice of its original construction; for that, the lessee might have been liable in an action on the case in the nature of waste, but in this action of covenant, the plaintiff must shew that he has been damnified, not by the original construction, but by the lessee's neglect to repair according to his covenant. If he had erected four walls without a roof, he might have been liable in waste, but not on this covenant. The lean-to is ill-constructed, but it is not shewn to be untenable from want of repair; and repair does not extend to reconstruction. And the question for the jury should have been left in a different manner; for a lessee is not bound to keep a house absolutely in the best repair, but substantially in a state which coincides with the age of the house. And the small amount of damages, 8l. 10s. upon the entire dwelling house, shews that there had been *no substantial breach of the covenant. In *Ferguson v.* — (2) Lord KENYON said, "in the present case the plaintiff has claimed a sum for putting on a new roof on an old worn-out house; this I think the tenant is not bound to do, and that the plaintiff has no right to recover it." That is confirmed by *Gutteridge v. Mungood* (3), where a lessee covenanted to keep old premises in repair, and it was held, that he was not liable for such dilapidations as resulted from the operation of time and the elements.

The defendants therefore ought to have been allowed to shew the state of the house at the time of the demise, and the jury should have been directed to take that into consideration; otherwise a lessee might be called on, under a covenant to repair, to substitute a new house for an old one.

TINDAL, Ch. J. :

This is an action on a covenant contained in a lease of a

(1) 42 R. R. 772 (1 Moody & Rob. 173).

(2) 5 R. R. 757 (2 Esp. 590).

(3) 1 Moody & Rob. 334.

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dwelling-house and the appurtenances for fourteen years, in which the tenant covenanted to preserve and keep, and at the end or other sooner determination of said term of fourteen years thereby granted, to leave the said demised messuage and other buildings, and all the outhouses, offices, windows, doors, drains, sewers, pipes, and other watercourses, gates, hedges, and fences, belonging to, in, or about the said demised premises, in good and tenantable order and repair, all losses and damages by fire or tempest in the mean time excepted.

The tenant pleaded performance, repeating the language of the covenant. The question therefore for the jury was, whether he had kept and left the demised messuage and other buildings, and all the outhouses, in good and tenantable repair. I agree that in all these cases the question is whether the premises have been *kept in substantial repair, as opposed to claims for fancied injuries, such as a mere crack in a pane of glass, or the like. In the present case the jury have found damages to the amount of 14*l.* 10*s.* The objections to this verdict are two. First, that as to 8*l.* 10*s.*, in respect of the general repairs, the jury have been misdirected: secondly, that as to the 6*l.* allowed for the defective state of the lean-to, the plaintiff has no claim at all, the building at the time of the action being in the same state as when first erected.

[*9]

The misdirection complained of, is, that the jury were told it was of no consequence for them to consider whether the house were completely new, or old, at the time of the demise. If such had really been the direction given to the jury, I should have thought there ought to be another trial; but the learned Baron does not report to us that such was the direction given; and the counsel are not agreed as to the precise words: it is probable, therefore, that there has been some little misunderstanding, and that the language, if employed, was only used in illustration or explanation of the proposition, that, under a covenant to keep and leave premises in repair, the state of repair at the time of the demise is not to be taken into consideration. This must have been so from the course the cause took: allusion is made to the same topic in the examination of the defendants' witnesses, but even they admit there was some want of repair both in the house

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[*10]

and the lean-to. The only question therefore is whether the damages are too large: but, after the testimony of the defendants' own witnesses, how are we to say there ought not to be a verdict for the plaintiff? The case must have been left to the jury only as to the amount of damages; and if so, we ought not to interfere with a verdict for only 14*l.* 10*s.* If the learned Baron said it made no difference whether the house was new or old, at the time of the demise, I *should not go that length; but as it appears, according to the defendants' own witnesses, that there was some want of repair, this rule must be discharged.

GASELEE, J., not having heard the entire case, gave no opinion. But

PARK, J. and VAUGHAN, J. concurring with the CHIEF JUSTICE, the rule was

Discharged.

1836.
May 26.
[10]

GRISSELL AND ANOTHER v. ROBINSON.

(3 Bing. N. C. 10—17; S. C. 3 Scott, 329; 2 Hodges, 138; 5 L. J. (N. S.) C. P. 313.)

P. orally agreed to grant defendant a lease for sixty years: defendant paid part of the consideration, but P. died before the contract was carried into effect. Plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the Court of Chancery, and that the lease was granted pursuant to a proposal of plaintiffs thereafter mentioned.

Plaintiffs having paid their own attorney his charges for drawing this lease, held, that they were entitled to sue defendant for money paid, and that, in their own right.

THIS was an action to recover money alleged to have been paid by the plaintiffs to the use of the defendant, under the following circumstances:

In May, 1830, Peto agreed orally, in consideration of 450*l.*, to grant the defendant a lease of certain premises for sixty years; and the defendant lodged 300*l.*, parcel of the consideration money, in the hands of a mutual agent, till Peto's title should be made out.

In September, 1830, before this agreement was carried into effect, Peto died, leaving the plaintiffs his executors, who applied

to the Court of Chancery to compel a specific performance of the agreement.

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That Court however refused to interfere, on the ground that the agreement, being oral, was void by the Statute of Frauds.

Ultimately, the plaintiffs agreed to grant the defendant a lease on the terms proposed by their testator; and a lease was accordingly drawn by Taylor, the plaintiffs' *attorney, which recited the agreement with Peto; his death; the application to the Court of Chancery; the refusal of that Court to act on Peto's agreement; and that the lease was thereupon granted, pursuant to a proposal by the plaintiffs as thereafter mentioned.

[*11]

This lease was approved by the defendant's attorney, and a counterpart was executed by the defendant in June, 1835; but the lease remained in the hands of Taylor, because the defendant had not paid 150*l.*, the residue of the consideration.

By order of the Court of Chancery Taylor was paid for drawing the lease, out of a fund in that Court belonging to the plaintiffs; and the defendant refusing to reimburse them, this action was brought to compel him.

At the trial, three witnesses proved that, upon granting a lease, it is the custom for the lessor's attorney to prepare the lease at the expense of the lessee; and a verdict having been given for the plaintiffs,

Talfourd, Serjt. obtained a rule *nisi* to set it aside, and enter a nonsuit instead, on the ground that the plaintiffs ought to have sued as executors, and not in their own right, the payment having been made for a lease, the agreement for which originated with the testator: *Aspinall v. Wake* (1). There, the plaintiffs, executors of A., continued to carry on his business, and drew bills, as executors, for goods which they sold to the defendants: the defendants having accepted sundry such bills, it was held, that the plaintiffs might properly sue as executors for the price of the goods. A further ground for the rule was, that, at all events, the plaintiffs could not recover on the common count for money paid, but should have declared specially on the

(1) 10 Bing. 51.

GRISSELL custom under which a lessee is called on to pay for a lease
 v. ROBINSON. drawn by the attorney of the lessor.

[12]

Thesiger and W. H. Watson shewed cause :

The agreement by the testator to grant a lease for more than three years, being oral, was void by the Statute of Frauds. Accordingly, the Court of Chancery refused to enforce it, and that fact is recited in the lease granted by the plaintiffs. The lease therefore originated with them, and not with the testator, and they were entitled to sue in their own right. In *Brassington v. Ault* (1), where three executors ordered goods to be sold as the goods of their testator, and afterwards sued for the amount without styling themselves executors, and without joining a fourth executor who was named in the will, it was held that they might recover. *Aspinall v. Wake* only shews that the plaintiffs *might* have sued in their representative capacity ; not that under circumstances like the present they are precluded from suing in their own right. And the count for money paid is proper in this case. Wherever a party has been compelled to pay money, for which another is ultimately liable, the party so liable may be sued for money paid to his use : *Erall v. Partridge* (2) ; *Brown v. Hodgson* (3) ; *Dawson v. Linton* (4). Here, the plaintiffs, from the privity between them and Taylor, were compelled to pay Taylor in default of the defendant, but the defendant was ultimately liable. In *Rigby v. Daykin* (5), where a proposed borrower being desirous of raising a sum of money upon mortgage, employed an attorney for the purpose, who applied to A., an attorney, telling him at the same time the name of his principal, and A. agreed to advance the money on behalf of a client, but ultimately the negotiation failed from a defect of title, it was held, that A. could not maintain an action against the proposed borrower for his fees, although it was proved to be the practice for the proposed *borrower to pay the expenses of the proposed lender ; the course being for the attorney for the latter to send his bill to the attorney of the

[*13]

(1) 27 R. R. 581 (2 Bing. 177).

(2) 4 R. R. 656 (8 T. R. 308).

(3) 4 Taunt. 189.

(4) 5 B. & Ald. 521.

(5) 31 R. R. 554 (2 Y. & J. 83).

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former, who, if the bill were reasonable, recommended his client to pay it. But the case only establishes, that in circumstances like the present, Taylor could not sue the defendant; not that the plaintiffs, when they have paid Taylor, are precluded from suing the defendant for a charge which he ought to have defrayed, though he might not be immediately responsible to Taylor. Again, in *Spencer v. Parry* (1), where a tenant agreed with his landlord to pay the rent, clear of all rates and taxes, and after occupying the premises for some time, quitted them, leaving poor rates and land tax unpaid; the receiver of the rents was compelled to pay the rates, under a local Act, and the succeeding tenant the land tax; which rates and land tax were repaid to them by the landlord; it was held, that the landlord's remedy was on the special agreement, and that he could not recover those sums from the first tenant as money paid to that tenant's use.

But there, the landlord was not liable to pay the rates at all, except under the special agreement; unless, therefore, he sued on that agreement, he had no claim at all. The case was the same in *Adams v. Dansey* (2). Here, by the general practice, the defendant ought to have paid for the lease; and the contract having been executed, the proper course was to declare for money paid to the defendant's use.

Talfourd, contra :

The first question is with whom the contract to grant a lease originated: if it originated with the testator, as the recital to the lease alleges, the plaintiff ought to have sued in the capacity of executors.

At all events they should have declared specially on the custom. Either the defendant was liable to pay *Taylor or not. If he *was* liable, the plaintiffs could not, without his consent, substitute themselves as his creditors in the place of Taylor. If he was *not* liable, the plaintiffs can have no claim on him except by virtue of the special contract. At all events the action is premature as long as the lease is withheld. And the evidence as to the custom only shews, that the expense of

[*14]

(1) 3 Ad. & El. 331; 4 N. & M. 770. (2) 31 R. R. 480 (6 Bing. 506).

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the lease is usually borne by the lessee, not that it is payable in the first instance by the lessor. In *Stokes v. Lewis* (1) it was held, that assumpsit for money paid, laid out, and expended, would not lie when the money had been paid against the express consent of the party for whose use it was supposed to have been paid.

TINDAL, Ch. J. :

The first objection to this action is, that the plaintiffs have sued in their personal character, and not in the capacity of executors. It has been contended, that, as the payment in respect of which they sue, arose out of a transaction which commenced in the lifetime of the testator, they ought to have sued in the character of executors.

But as the payment was made after the death of the testator, and upon a state of facts arising altogether after his death, the plaintiffs had a right to sue, if, indeed, they were not compellable to sue, in their own capacity. The struggle has generally been the other way, in attempts, previously to the recent statute, to assume the character of executor where it was not warranted, in order to elude the payment of costs : as in *Ord v. Fenwick* (2), where the plaintiff below joined a count on promises to her as executrix, to repay money paid by her as executrix to the use of the defendant below, with a count on promises to her testator for money paid by him to the use of the defendant below : and it was asked what right the plaintiff had to join the *claim in her capacity of executrix ; no one doubting she could sue in her natural character.

[*15]

Here, the testator entered into a parol contract for a long lease, which was so far carried into effect that money was lodged by the defendant to pay part of the consideration. The testator then died, and the Court of Chancery refused to enforce the contract because there was no memorandum in writing ; so that, by the recital of the lease, it is declared to be granted on the proposal of the plaintiffs thereafter mentioned ; that is, a new and distinct proposal after the death of the testator. The payment, therefore, having been made by the plaintiffs after the

(1) 1 T. R. 20.

(2) 3 East, 104.

testator's death, and on a state of facts arising after his death, there is no reason why they should not sue in their natural character.

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The second objection is, that the action for money paid does not lie against the defendant under the circumstances; but that the plaintiffs should have declared, if at all, on the special contract. I have always understood the distinction as to the obligation to sue on the special contract rather than on the general count to be, that where, at the time of the payment, any thing remains to be done under the contract, of which the plaintiff must shew performance, the action should be on the special contract; but where all has been done, and the plaintiff has only to prove the payment of the money, then he may sue on the general count; and in order to recover on that count, the plaintiff must shew an express or implied assent of the defendant to the payment of the money, or that it was paid upon compulsion for the use of the defendant. Here, the money was paid by the plaintiffs to Taylor, their attorney, who had prepared the lease of the premises demised to the defendant. The evidence shews that it is the custom for the landlord's attorney to draw the lease, and that it is paid for by the lessee. That being the position of *the parties, in what way could a special contract be stated, which, in concise expression, would not shew the money to have been paid to the defendant's use? for it was a lease which the defendant was ultimately bound to pay for, and the plaintiffs were compelled to pay in the first instance by virtue of the privity between them and Taylor.

[*16]

In all cases where one of two joint sureties pays money which either of them may be called on to pay, a special contract by the co-surety to repay him might be stated in an extended form; but in a compressed shape, the moiety is money paid to the use of the co-surety. So here the money was paid by the plaintiffs, who were liable in the first instance, upon an implied engagement in the defendant to repay them, because he was ultimately liable. Coupling those two facts together, I think this action is properly brought on the count for money paid.

PARK, J. :

The first question is, whether this action should have been

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-

brought in the personal or representative character of the plaintiffs. The money was paid after the death of the testator, and though an agreement for the lease was commenced in his lifetime, yet that agreement was inoperative; the Court of Chancery refused to carry it into effect, and the whole was settled anew after his death. That was a new proposal, on which the plaintiffs had a right to sue in their individual character, and the case falls within the decision in *Ord v. Fenwick*. The other question has been ably argued; but as the plaintiffs were liable to their own attorney in first instance, and all the evidence shews, that, according to the custom, the defendant is ultimately bound to pay for the lease, he must be taken to have impliedly assented to the payment made by the plaintiffs, and the action lies for money paid to his use.

[17] GASELEE, J. :

The case has been so fully discussed, that I shall only observe, that, upon all contracts for work, to be done in a particular way, or at particular times, or for goods sold, to be paid for or delivered at particular times, after the work has been done and the goods delivered, the plaintiff may resort to the general count for work and labour, or for goods sold and delivered.

VAUGHAN, J. :

There was no binding contract for a lease in the lifetime of the testator; the contract, though inchoate in his life, was inoperative, and a new one entered into by the plaintiffs, in their own right. The action therefore is properly brought by them in their personal character.

As to the objection that they ought to have declared specially, —when once it is ascertained that the defendant is ultimately liable to defray the expense of the lease, the money paid by the plaintiffs is paid to his use.

Rule discharged.

CAMPION *v.* COLVIN AND OTHERS (1).

(3 Bing. N. C. 17—29; S. C. 3 Scott, 338; 2 Hodges, 116; 5 L. J. (N. S.) C. P. 317.)

1836.
May 27.
[17]

Plaintiff, a ship owner, having agreed with G. by charter-party, to convey a cargo to Calcutta, and to deliver a return cargo at the East India Docks in London, for a freight of 14*l.* a ton on the ship's tonnage; the last payment thereof to be made by bills at four months, on the arrival of the ship in the Thames; G. by his agents put goods on board at Calcutta, and consigned them to the defendants, who were aware of the existence of the charter-party: the plaintiff's captain signed a bill of lading, according to which freight for these goods was expressed to have been paid by bills on London: Held, that notwithstanding this bill of lading, plaintiff had, even as against defendants, a lien on these goods for the hire of the ship, due under the charter-party.

THIS was a feigned issue, directed by an order of the Court of Chancery. In the issue it was recited, that "certain goods, to wit, 511 bales of cotton wool, consigned to the defendants, had been carried and conveyed *in and on board of a certain ship or vessel called the *Hero*, whereof the plaintiff and others were owners, from Calcutta to the port of London;" and the issue was to try "whether the said plaintiff and his said co-owners of the said ship or vessel called the *Hero*, or any of them had a lien upon the said cotton wool, for freight beyond the amount of freight payable in respect of the carriage of the said cotton wool, upon the said voyage." The jury found for the plaintiff, viz. the affirmative of that issue, subject to the opinion of the Court on the following case:

[*18]

In the year 1816, and from thence until after the completion of the voyage hereinafter mentioned, the plaintiff and others were owners of the said ship called the *Hero* of London, and a charter-party with a memorandum thereto was then entered into between the plaintiff and one John Burton Gooch, then a merchant carrying on business in the city of London, for a voyage from London to Madeira, Madras, and Calcutta, and back to London; by which it was witnessed, that the owners, for the considerations therein mentioned, covenanted with the freighter, that the ship, being then tight, staunch, &c., the commander should immediately take on board the ship, in the port of London, from the freighter, all such goods as he might think fit to load, reserving sufficient room in the fore-castle and half-deck of the ship for the stowage

(1) *Neish v. Graham* (1857) 8 E. & B. 505.

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of the provisions and cables, the cargo not exceeding what she could reasonably carry beyond her stores, tackle, &c. ; and that, having received the same on board, the ship should proceed to Madeira, where she was to receive from the freighter's agents such other goods as they might think fit to load, and then proceed to Madras and Calcutta, and there deliver the outward cargo, and after being refitted, should receive on board all such lawful goods as the freighter's agents might think fit to load, and should then

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proceed *to London, and there, after immediate notice to the freighter of her arrival at the port of London, and readiness to deliver the cargo, deliver her homeward cargo, agreeably to bills of lading, and so complete the voyage.

The charter-party contained the usual covenants, specifying the number of lay days, and stipulating that the ship should take her regular turn in the East India Docks in London for the purpose of delivering her cargo ; that the freighter should pay to the owner a given sum for every passenger carried in the ship ; that all the cabins of the ship, except one for the use of the captain, should be at the disposal, and for the benefit of the freighter ; and that a supercargo, to be appointed by the freighter, should be conveyed out and home, and be found and provided with the ship's provisions. The charter-party then set out covenants from the freighter to load the ship at London, Madeira, and Madras, within the lay days, &c. ; and then to pay to the owner for the freight or hire of the ship for the voyage, at and after the rate of 14*l.* sterling per ton upon the ship's registered tonnage, and 2*l.* 10*s.* per cent. primage on the amount of the freight, in lieu of port and pilotage charges ; and that the freight and primage should be paid as follows ; viz., 500*l.* in cash at the expiration of six months from the date of the charter-party ; a moiety of the remainder by bills at two months after date from the day on which the ship should arrive in the Thames on her return from her homeward voyage ; and the residue by bills at four months' date from the same period. There was then a covenant with respect to demurrage, and also a memorandum that the freighter should have liberty to appoint one James Gooch Thompson to proceed out and home in the ship, and not only to act as supercargo, but to take upon him

the authority of the captain in the stowage of the cargo, which was to *be done under the entire direction of James Gooch Thompson; but he was not in any other particular to interfere with the duties of the captain or the ship.

CAMPION
r.
COLVIN.
[*20]

The defendants and Messrs. Colvin & Co. of Calcutta, at the time of the sailing of the vessel, and of her arrival at Calcutta, were cognizant of the said charter-party.

The said ship under the said charter-party, with a captain and crew appointed and paid by the owners, in or about the month of January, 1817, sailed on her said voyage with a cargo of merchandise belonging to the said J. B. Gooch, which had been shipped on board thereof by the said J. B. Gooch. The cargo was invoiced at 11,422*l.* 14*s.* Messrs. Bazett, Farquhar, Crawford & Co. of London, of which firm defendants were surviving partners, advanced to J. B. Gooch divers large sums of money to enable him to purchase his outward cargo, and the same was consigned by J. B. Gooch to Messrs. Colvin & Co., then merchants of Calcutta, as his agents, and was by Messrs. Colvin & Co., as agents of J. B. Gooch, received from on board the said ship at Calcutta, who disposed of the same for and on account of said J. B. Gooch, the said Messrs. Colvin & Co. of Calcutta being at the same time the general agents and correspondents of the defendants, and Bazett, since deceased, and David Colvin, one of the defendants, being at the time of making of the said charter-party and arrival of the ship in London, partner, as well in the house of Bazett & Co. of London, as of Colvin & Co. of Calcutta. Messrs. Colvin & Co., according to the direction of J. B. Gooch, put up the ship as a general ship at Calcutta, and succeeded in obtaining several shipments on freight; but not being able to fill the ship on advantageous terms, they purchased the 511 bales of cotton wool in the issue mentioned with advances made *by them on account of the said J. B. Gooch, they, Colvin & Co. having the outward cargo at that time in their possession.

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Price, the master or commander of the said ship *Hero*, signed the following bill of lading for those and other goods: "Shipped, by the grace of God, in good order and well conditioned, by Messrs. Colvin, Bazett, & Co., in and upon the good ship the

STANLEY
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TOWGOOD.

and the lean-to. The only question therefore is whether the damages are too large: but, after the testimony of the defendants' own witnesses, how are we to say there ought not to be a verdict for the plaintiff? The case must have been left to the jury only as to the amount of damages; and if so, we ought not to interfere with a verdict for only 14*l.* 10*s.* If the learned Baron said it made no difference whether the house was new or old, at the time of the demise, I *should not go that length; but as it appears, according to the defendants' own witnesses, that there was some want of repair, this rule must be discharged.

[*10]

GASELEE, J., not having heard the entire case, gave no opinion. / But

PARK, J. and VAUGHAN, J. concurring with the CHIEF JUSTICE, the rule was

Discharged.

1836.
May 26.
[10]

GRISSELL AND ANOTHER v. ROBINSON.

(3 Bing. N. C. 10—17; S. C. 3 Scott, 329; 2 Hodges, 138; 5 L. J. (N. S.) C. P. 313.)

P. orally agreed to grant defendant a lease for sixty years: defendant paid part of the consideration, but P. died before the contract was carried into effect. Plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been treated as void by the Court of Chancery, and that the lease was granted pursuant to a proposal of plaintiffs thereafter mentioned.

Plaintiffs having paid their own attorney his charges for drawing this lease, held, that they were entitled to sue defendant for money paid, and that, in their own right.

THIS was an action to recover money alleged to have been paid by the plaintiffs to the use of the defendant, under the following circumstances:

In May, 1830, Peto agreed orally, in consideration of 450*l.*, to grant the defendant a lease of certain premises for sixty years; and the defendant lodged 300*l.*, parcel of the consideration money, in the hands of a mutual agent, till Peto's title should be made out.

In September, 1830, before this agreement was carried into effect, Peto died, leaving the plaintiffs his executors, who applied

to the Court of Chancery to compel a specific performance of the agreement.

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ROBINSON.

That Court however refused to interfere, on the ground that the agreement, being oral, was void by the Statute of Frauds.

Ultimately, the plaintiffs agreed to grant the defendant a lease on the terms proposed by their testator; and a lease was accordingly drawn by Taylor, the plaintiffs' *attorney, which recited the agreement with Peto; his death; the application to the Court of Chancery; the refusal of that Court to act on Peto's agreement; and that the lease was thereupon granted, pursuant to a proposal by the plaintiffs as thereafter mentioned.

[*11]

This lease was approved by the defendant's attorney, and a counterpart was executed by the defendant in June, 1835; but the lease remained in the hands of Taylor, because the defendant had not paid 150*l.*, the residue of the consideration.

By order of the Court of Chancery Taylor was paid for drawing the lease, out of a fund in that Court belonging to the plaintiffs; and the defendant refusing to reimburse them, this action was brought to compel him.

At the trial, three witnesses proved that, upon granting a lease, it is the custom for the lessor's attorney to prepare the lease at the expense of the lessee; and a verdict having been given for the plaintiffs,

Talfourd, Serjt. obtained a rule *nisi* to set it aside, and enter a nonsuit instead, on the ground that the plaintiffs ought to have sued as executors, and not in their own right, the payment having been made for a lease, the agreement for which originated with the testator: *Aspinall v. Wake* (1). There, the plaintiffs, executors of A., continued to carry on his business, and drew bills, as executors, for goods which they sold to the defendants: the defendants having accepted sundry such bills, it was held, that the plaintiffs might properly sue as executors for the price of the goods. A further ground for the rule was, that, at all events, the plaintiffs could not recover on the common count for money paid, but should have declared specially on the

(1) 10 Bing. 51.

GRISSELL custom under which a lessee is called on to pay for a lease
 v.
 ROBINSON. drawn by the attorney of the lessor.

[12]

Thesiger and *W. H. Watson* shewed cause :

The agreement by the testator to grant a lease for more than three years, being oral, was void by the Statute of Frauds. Accordingly, the Court of Chancery refused to enforce it, and that fact is recited in the lease granted by the plaintiffs. The lease therefore originated with them, and not with the testator, and they were entitled to sue in their own right. In *Brassington v. Ault* (1), where three executors ordered goods to be sold as the goods of their testator, and afterwards sued for the amount without styling themselves executors, and without joining a fourth executor who was named in the will, it was held that they might recover. *Aspinall v. Wake* only shews that the plaintiffs *might* have sued in their representative capacity ; not that under circumstances like the present they are precluded from suing in their own right. And the count for money paid is proper in this case. Wherever a party has been compelled to pay money, for which another is ultimately liable, the party so liable may be sued for money paid to his use : *Exall v. Partridge* (2) ; *Brown v. Hodgson* (3) ; *Dawson v. Linton* (4). Here, the plaintiffs, from the privity between them and Taylor, were compelled to pay Taylor in default of the defendant, but the defendant was ultimately liable. In *Rigby v. Daykin* (5), where a proposed borrower being desirous of raising a sum of money upon mortgage, employed an attorney for the purpose, who applied to A., an attorney, telling him at the same time the name of his principal, and A. agreed to advance the money on behalf of a client, but ultimately the negotiation failed from a defect of title, it was held, that A. could not maintain an action against the proposed borrower for his fees, although it was proved to be the practice for the proposed *borrower to pay the expenses of the proposed lender ; the course being for the attorney for the latter to send his bill to the attorney of the

[*13]

(1) 27 R. R. 581 (2 Bing. 177).

(2) 4 R. R. 656 (8 T. R. 308).

(3) 4 Taunt. 189.

(4) 5 B. & Ald. 521.

(5) 31 R. R. 554 (2 Y. & J. 83).

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former, who, if the bill were reasonable, recommended his client to pay it. But the case only establishes, that in circumstances like the present, Taylor could not sue the defendant; not that the plaintiffs, when they have paid Taylor, are precluded from suing the defendant for a charge which he ought to have defrayed, though he might not be immediately responsible to Taylor. Again, in *Spencer v. Parry* (1), where a tenant agreed with his landlord to pay the rent, clear of all rates and taxes, and after occupying the premises for some time, quitted them, leaving poor rates and land tax unpaid; the receiver of the rents was compelled to pay the rates, under a local Act, and the succeeding tenant the land tax; which rates and land tax were repaid to them by the landlord; it was held, that the landlord's remedy was on the special agreement, and that he could not recover those sums from the first tenant as money paid to that tenant's use.

But there, the landlord was not liable to pay the rates at all, except under the special agreement; unless, therefore, he sued on that agreement, he had no claim at all. The case was the same in *Adams v. Dansey* (2). Here, by the general practice, the defendant ought to have paid for the lease; and the contract having been executed, the proper course was to declare for money paid to the defendant's use.

T'alfourd, contra :

The first question is with whom the contract to grant a lease originated: if it originated with the testator, as the recital to the lease alleges, the plaintiff ought to have sued in the capacity of executors.

At all events they should have declared specially on the custom. Either the defendant was liable to pay *Taylor or not. If he *was* liable, the plaintiffs could not, without his consent, substitute themselves as his creditors in the place of Taylor. If he was *not* liable, the plaintiffs can have no claim on him except by virtue of the special contract. At all events the action is premature as long as the lease is withheld. And the evidence as to the custom only shews, that the expense of

[*14]

(1) 3 Ad. & El. 331; 4 N. & M. 770. (2) 31 R. R. 480 (6 Bing. 506).

1836.
May 31.

GEORGE SMITH *v.* JAMES SMITH, ADMINISTRATOR
OF JAMES SMITH.

[29]

(3 Bing. N. C. 29—33; S. C. 3 Scott, 352; 2 Hodges, 130; 5 L. J. (N. S.)
C. P. 305.)

In trover for a watch, defendant pleaded that it was not the property of the plaintiff, and proved that it had been in defendant's possession for four years previous to the death of a former owner; but having also put in evidence letters of administration granted to him of the effects of the former owner: Held, that the declarations of that owner were evidence against him.

TROVER for a watch.

Plea, that the watch was not the property of the plaintiff; upon which issue was joined.

At the trial before Vaughan, J., it appeared that the watch in question had originally belonged to the intestate, who was the father of the plaintiff and defendant, and died in 1833.

[*30]

The plaintiff proved, that in 1824 the intestate had given him the watch; but one of the plaintiff's witnesses disclosed, on cross-examination, a declaration by the intestate, in the presence of the plaintiff, that the plaintiff had taken the watch out of the intestate's strong box without permission, and that the intestate had, therefore, given the watch to the defendant.

Thereupon, the plaintiff offered evidence of other declarations by the intestate as to the circumstances under which the watch came into the plaintiff's hands; but this evidence was rejected.

The defendant then proved that he had been in possession of the watch for four years previously to the death of the intestate; and concluded his case by putting in the letters of administration granted to him of the intestate's effects.

The plaintiff's counsel then proposed to give in evidence declarations of the intestate as to the gift to the plaintiff. This evidence, however, was rejected; and a verdict being found for the defendant,

Bompas, Serjt. moved to set it aside, on the ground that the declarations of the intestate were evidence against the defendant, who, from his putting in the letters of administration, must be deemed to claim as administrator, as well as in virtue of his four

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years' possession. In *Irat v. Finch* (1) it was held, that, upon an issue between A. and B., whether C. died possessed of certain property, evidence might be given of declarations made by C. that she had assigned the property to A. A rule *nisi* having been granted,

Byles shewed cause :

On the plea of no property in the plaintiff, the defendant stands on his four years' possession, not on the letters of administration ; and it was for the plaintiff to establish a better title. The declarations, therefore, were not admissible as the declarations *of a party under whom the defendant claimed. But even if the defendant be taken to claim as administrator, the declarations were inadmissible as having been made when the intestate was not in possession of the watch. In *Pocock v. Billings* (2), it was held, that declarations of a former holder of a bill of exchange, made during his possession, were evidence against a subsequent indorsee ; and BEST, Ch. J. said he "likened the case to that of declarations made by the owner of an estate during his possession."

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Nor can the evidence be received as the declaration of a deceased person, made against his own interest: the transfer to the intestate's son, being in diminution of the expense of maintenance, was not against the intestate's interest ; the property was still in the family. If he were still alive, he could not by his own declarations make evidence for himself ; and, on the same principle, he cannot make it for his representative. In *Woolway v. Rowe* (3), the declarations of a former owner of the property in dispute were received notwithstanding he was still alive ; that, however, was only on the ground of identity of interest with the party in the cause. But in *Glyn v. Bank of England* (4), where a bill was brought by executors, on a loss of notes described in a list in the testator's own handwriting, the list was not admitted as evidence of the property in a court of equity, but left to a court of law, although the rule of evidence there was the same as at law. And in *Rex v. Debenham* (5),

(1) 9 R. R. 716 (1 Taunt. 141).

(4) 2 Ves. 43.

(2) Ry. & Moo. 127.

(5) 20 R. R. 401 (2 B. & Ald.

(3) 40 R. R. 264 (1 A. & E. 114).

185).

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 v.
 SMITH.

[*32]

where, on an appeal, the respondents, in order to prove the fact of the delivery to them of a certificate given by the appellants, acknowledging the pauper to be their settled inhabitant, produced an old book from their own parish chest, in which was an entry of that fact in the handwriting of a *former parish officer, it was held, that such evidence was inadmissible. So in *Bernasconi v. Farebrother* (1), assignees were not allowed to avail themselves of the declaration of the bankrupt under whom they claimed. Further, declarations of a deceased person, admitted as made against his own interest, must, in order to their reception, be made in the course of a business in hand, and not dropped loosely and spontaneously: 1 Stark. Evid. 297.

Irat v. Finch is distinguishable on the ground that the party was bound to justify under the deceased, and could make no case in any other way.

Bompas, Serjt., and *Chandless*, in support of the rule, relied on *Irat v. Finch*, contending that after the defendant had put in the letters of administration he must be taken to claim as administrator; and, as to the time of the alleged declarations, referred to *Davies v. Pierce* (2), and *Roe d. Brune v. Rawlings* (3), where Lord ELLENBOROUGH said, "There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus, the written memorandum of a father as to the time when his child was born, has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will. And yet the most that can be said for such evidence is the peculiar means of knowledge of the fact by the father, and the absence of all interest in him at the time of the memorandum or declaration made to falsify the truth in respect of it."

TINDAL, Ch. J.:

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The opinion I form arises from the exact position of the cause at the time it went to the *jury. It is true the issue was negative, that the plaintiff had no property in the watch; but that

(1) 3 B. & Ad. 372.

(3) 8 R. R. 632 (7 East, 279).

(2) 1 R. R. 419 (2 T. R. 53).

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issue might be decided by an affirmative inconsistent with the negative, which indeed would be the most satisfactory proof. When the defendant's case was just closed, the letters of administration to him were put in evidence. It might be thought from his offering that evidence that he claimed as administrator; it was open to the jury to draw such an inference; and in answer to that evidence it was open to the plaintiff to shew what the intestate had said on the subject of the matter in contest. Strictly speaking, the defendant claims under him; the case, therefore, is stronger for the admission of the evidence than *Ivat v. Finch*. I think, therefore, the rule for a new trial should be made absolute.

PARK, J. :

I should have acted as the learned Judge at the outset; but when the letters of administration were put in, the defendant seemed to claim in right of the intestate, and the plaintiff had a right to give in evidence the intestate's declarations.

GASELEE, J. and VAUGHAN, J. concurred.

Rule absolute.

THE WARDENS AND COMMONALTY OF THE
MYSTERY OF GROCERS *v.* DONNE (1).

(8 Bing. N. C. 34—44; S. C. 3 Scott, 356; 2 Hodges, 120; 5 L. J. (N. S.)
C. P. 307.)

1836.
June 1.

[34]

An arbitrator found that Commissioners of Sewers had, by tunnelling, constructed a sewer fit and proper to be made, in a workmanlike, skilful, and proper manner in all respects; but that the probability of damage accruing would have been in some degree less if the sewer had been made by open cutting instead of tunnelling;

Held, that the Commissioners were not responsible for an injury to an adjoining building, occasioned by the tunnelling.

THIS action was brought by the Grocers' Company against the defendant, as clerk of the Commissioners of Sewers, under the forty-second section of 4 Geo. IV. c. 114, to recover damages for the injury occasioned to a house belonging to the plaintiffs, and occupied by Mr. Bicknell, their clerk, bordering upon Princes Street. The house, as was alleged, settled and sank, and was
(1) *Hammond v. St. Pancras Vestry* (1874) L. R. 9 C. P. 316; 43 L. J. C. P. 157.

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cracked and damaged in various places, in consequence of the foundations being disturbed and drawn from under it by the works connected with the construction of a sewer along Princes Street. The mode of construction adopted was by a tunnel carried along the street at a depth of thirty feet from the surface, and contiguous to the foundation of the plaintiffs' house; and it was alleged, that the excavation for the tunnel caused a subsidence of the soil, which affected the foundation.

The declaration stated, that before and at the time of the committing of the grievances hereinafter mentioned, plaintiffs were lawfully possessed of and in a certain ancient messuage and premises situate and being in the parish of St. Mildred the Virgin, in the city of London, which said messuage was then used by plaintiffs for the occupation of a certain servant of plaintiffs; yet said Commissioners of Sewers of the city of London and liberties thereof, well knowing the premises, but wrongfully and injuriously intending to injure plaintiffs in respect of their said ancient messuage and premises with the appurtenances as aforesaid, to wit, on the 7th of August, 1834, wrongfully and injuriously did make, cut, and dig a certain shaft, sewer, gutter, and ditch *near unto said ancient messuage and premises so in possession of plaintiffs as aforesaid, and did unskillfully, wrongfully, and improperly, make, cut, and dig said shaft, sewer, gutter, and ditch, so being near unto said ancient messuage and premises of plaintiffs as aforesaid, and did also make, cut, and dig said shaft, gutter, sewer, and ditch without shoring up, propping, or duly securing said messuage and premises, or the earth and subsoil supporting the walls of said ancient messuage and premises of plaintiffs as aforesaid, in order to prevent same from being injured by said making, cutting, and digging of said shaft, sewer, gutter, and ditch as aforesaid; and without giving due notice to plaintiffs of the intention of them, the said Commissioners, to dig, make, and cut said shaft, sewer, gutter, and ditch, so as to enable plaintiffs to shore and prop up their said ancient messuage and premises: by means of which several premises, said ancient messuage and premises of plaintiffs, became and were, and still are greatly injured and weakened. and the walls, partitions, ceilings, floors,

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and other parts of said ancient messuage and premises of plaintiffs were damaged, so that said messuage of plaintiffs had become and was dangerous to live and reside in; and plaintiffs, from the time of committing the aforesaid grievances, hitherto, had been and were hindered and prevented from enjoying their said ancient messuage and premises in so ample and beneficial a manner as they might and otherwise would and ought to have done; and had been obliged to expend divers sums of money, amounting to the sum of 500*l.*, in and about the obtaining another residence for said servant of plaintiffs, and in and about removing divers articles of furniture, and other goods and chattels from and out of their said ancient messuage; and by means of the said several premises, said messuage and premises had been and were much injured and *lessened in value, and thereby the same had become and were of no use or value to plaintiffs; and plaintiffs, by means of the premises, were injured and damnified to a large amount.

[*36]

Plea, not guilty.

The cause having been referred to arbitration under an order of Nisi Prius, the arbitrator found, that the defendant was clerk to the Commissioners of Sewers of the city of London and liberties thereof, and that a deep sewer had been lately made by order and under the directions of the said Commissioners, in Princes Street in the said city, and within the jurisdiction of the said Commissioners, near to the dwelling-house of the plaintiffs in the declaration in this cause mentioned. That Princes Street was a narrow street; and that there were, in most parts of it, heavy buildings on one or other of the sides, and in some places on both sides of the street, one of which was the said house of the plaintiffs. That there were two modes of making a sewer practised in the city of London: the one by what is called tunnelling, and the other by what is called open cutting. That in Princes Street, as in most other narrow streets, with heavy buildings adjoining on them, a deep sewer could not be made either by the one method or the other without risk of damage to the adjoining buildings. That the amount of risk varied according to the nature of the soil; that the soil of Princes Street was of a kind to make the risk considerable; and that

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the nature of the soil was known, or might, by due enquiry and proper experiments, have been known to the said Commissioners before the making of the sewer. That the probability of damage accruing was in some degree less where the sewer was made by open cutting, than by tunnelling. That the sewer in this case was made by the mode of tunnelling. That the Commissioners, in directing the sewer to be made, and in the making of it, *were acting *bonâ fide* in the honest discharge of their duty as Commissioners; and that the sewer was fit and proper to be made for the convenient drainage of the city of London, and was made in a workmanlike, skilful, and proper manner in all respects, provided that the Commissioners were justified in making the sewer by the mode of tunnelling. That in consequence of the making of the sewer, the house of the plaintiffs was damaged to the amount of 400*l*. Upon the whole matter, therefore, the arbitrator found, that if the Commissioners were authorised to make the sewer by the mode of tunnelling, the verdict ought to be for the defendant. But if the Commissioners were bound to pursue the mode which afforded the utmost possible chance of preventing damage to the adjoining buildings, the verdict ought to be for the plaintiffs, to the amount of 400*l*. And thereupon the arbitrator awarded that the verdict which had been taken for the plaintiffs should stand, if the Court should be of opinion that the verdict ought to be entered for the plaintiffs; but if the Court should be of opinion that the verdict ought to be entered for the defendant, then he awarded that the verdict already entered should be set aside, and instead thereof, that a verdict should be entered for the defendant.

A rule *nisi* having been obtained to enter a verdict for the plaintiffs for 400*l*. and costs, the Court desired that the case might be entered on the special paper; and now,

[After argument:]

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TINDAL, Ch. J.:

It appears to me that the question is, whether the facts found by the arbitrator bring the case within the terms of the

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declaration. The cause having been referred to an arbitrator, who has stated the facts for the opinion of the Court, we must see whether they raise the duty set up by the declaration. What the plaintiffs allege is, that the Commissioners wrongfully and injuriously did make, cut, and dig a certain shaft, sewer, gutter, and ditch, near unto an ancient messuage and premises in possession of plaintiffs, and did unskilfully, wrongfully, and improperly make, cut, and dig the said shaft, sewer, gutter, and ditch, so being near unto the said ancient messuage and premises of plaintiffs as aforesaid, and did also make, cut, and dig the said shaft, gutter, sewer, and ditch, without shoring up, propping, or duly securing the said messuage and premises, or the earth and subsoil supporting the walls of the said ancient messuage and premises of plaintiffs as aforesaid, in order to prevent the same from being injured by the said making, cutting, and digging of said shaft, sewer, gutter, and ditch as aforesaid.

As to what follows about notice, the arbitrator has raised no question. Let us look at the facts found, and see whether the Commissioners have conducted themselves in an unskilful, wrongful, and improper manner in making the sewer in question.

As to the charge of unskilful work, the award expressly finds that the work was done in a skilful and proper manner; but the question is, whether on one particular finding the Commissioners should have proceeded by open work rather than by tunnelling. If the award had found that no injury to the plaintiffs would have ensued, had the Commissioners proceeded by open work, that would have authorised a verdict for the *plaintiffs; but the arbitrator finds that there would have been risk in either way, and only a greater chance of escape from injury if the Commissioners proceeded in one particular way: and if they were bound to pursue the mode which gave the greatest possible chance of escape from injury, the verdict ought to be entered for the plaintiffs. But how are we to say that the Commissioners are liable to damages, not because they did not perform the work in a skilful, proper, and workmanlike manner, but because they did not adopt the course which afforded the utmost possible chance of escape from injury? The Court is not to balance possibilities,

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or to fix the Commissioners with damages for an injury which might or might not have accrued had they pursued the course suggested. To fix the Commissioners, it should have been shewn on the award that the injury would not have happened if the sewer had been constructed by open working. The verdict therefore must be entered for the defendant.

PARK, J.:

I am of the same opinion. The defendants being public Commissioners, it should have been shewn that they were guilty of negligence in order to warrant a finding against them. The award however shews that there was no mode of proceeding which would have been unattended with risk: the street was narrow; and the soil was of a nature which rendered excavation dangerous; and though the probability of danger accruing from open cutting was less than by tunnelling, it is said to be only in some degree less. How are we to say in what degree, or to make the Commissioners responsible for a slight difference, when the award finds, "that the sewer was fit and proper to be made for the convenient drainage of the city of London, and was made in a workmanlike, skilful, and proper manner, in all respects, provided that the Commissioners were justified in making *the sewer by the mode of tunnelling: that if the Commissioners were authorised to make the sewer by the mode of tunnelling, the verdict ought to be for the defendant: but if the Commissioners were bound to pursue the mode which afforded the utmost possible chance of preventing damage to the adjoining buildings, the verdict ought to be for the plaintiffs."

[*44]

It has never been held that a public officer who acts to the best of his judgment and with proper skill, is responsible for the utmost possible degree of certainty.

GASELEE, J.:

I should have been glad if the arbitrator had made a choice between the two modes which it was open to the Commissioners to pursue. On a case stated like this I have not sufficient materials to give a decided judgment, though when it is said "that the sewer was fit and proper to be made for the convenient

drainage of the city of London, and was made in a workmanlike, skilful, and proper manner in all respects, provided that the Commissioners were justified in making the sewer by the mode of tunnelling," I do not see enough to justify us in deciding against the Commissioners.

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VAUGHAN, J. :

I am not enabled to say that the Commissioners are tortfeasors, and that the allegations in the declaration, that they unskilfully, wrongfully, and improperly cut the sewer, have been made out. Nor is it found in the award that damage has been occasioned by tunnelling which would not have accrued from open cutting. The question is, whether public officers are not protected in the discharge of a duty in which it is found they have acted *bonâ fide* and in a workmanlike, skilful, and proper manner. I think the distinction taken in *Sutton v. Clarke* (1), in favour of public functionaries, is well founded, and that we should give

Judgment for the defendant.

GAUNT v. WAINMAN.

(3 Bing. N. C. 69—70; S. C. 3 Scott, 413; 2 Hodges, 184; 5 L. J. (N. S.) C. P. 344.)

1836.
June 7.
[69]

A tenant took lands from the assignees of demandant's husband by deed which described them as freehold: Held, that he was not estopped by that deed, as against demandant in dower, to prove them to be leasehold.

To a writ of dower the tenant pleaded that the husband of demandant was not at the time of her marriage with him seized of such estate in the messuages and lands, &c. in question, whereof he could endow the demandant.

At the trial it appeared that in October, 1824, the assignees of the demandant's husband, then a bankrupt, conveyed the premises in question to the defendant under the description of, "All that messuage, and all such plot or part as is of the nature or tenure of freehold, of and in a close called Near Bank."

The tenant proved that the premises were leasehold: but, it

(1) 16 R. R. 563 (6 Taunt. 29).

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being objected that he was estopped to offer this proof against the deed under which he had taken the premises, the verdict was entered for the demandant, with leave for the tenant to move to set it aside.

A rule *nisi* having been obtained accordingly,

Cresswell and *Hoggins*, who shewed cause, referred to Shepp. Touchst. 58, and the authorities cited in the judgment of the Court in *Lainson v. Tremere* (1), to shew that the tenant was estopped by the deed under which he claimed title to dispute the nature of the title conferred by that deed.

(TINDAL, Ch. J.: As between the parties to that deed there may be an estoppel; but you set it up against a stranger to the deed.)

The defendant, buying the property subject to dower, bought it, in effect, of the wife as well as of the husband; he is therefore
[*70] estopped to turn round against the party of *whom he purchased.

(TINDAL, Ch. J: Suppose he had bought the premises as a leasehold; would the demandant be estopped to say that they were freehold?)

It may be conceded she would not.

Wightman, for the tenant:

That disposes of the case, for there can be no estoppel unless it be mutual. But this was no estoppel even as between the parties to the deed; for if it were, a party who should buy a leasehold under the representation that it was freehold, could never bring an action on the covenant for title. He would be under the double disadvantage of not having the estate he bargained for, and of being subject to dower upon a leasehold estate.

TINDAL, Ch. J.:

I think this is a case in which the defendant is not precluded from shewing the real nature of the estate. According to Co. Litt. 352 a, "Every estoppel ought to be reciprocal, that

(1) 40 R. R. 426 (1 Ad. & El. 792).

is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel."

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It would be hard indeed if it were otherwise; and therefore this rule must be made

Absolute.

BROGDEN v. MARRIOTT (1).

(3 Bing. N. C. 88—91; S. C. 2 Scott, 712; 2 Hodges, 136; 5 L. J. (N. S.) C. P. 302.)

1836.
June 8.
[88]

An agreement by which defendant sold plaintiff a horse for 200*l.* if he trotted eighteen miles within the hour, but for 1*s.* if he failed: Held ill on arrest of judgment.

THE plaintiff sought by this action to recover damages of the defendant for not delivering a horse pursuant to the following agreement: "Agreed to sell my horse Partington to Mr. John Brogden, of Manchester, for the sum of 200*l.*, provided that he trots eighteen miles within one hour; and, that, to be done within one month from this day; and Mr. J. Norcliffe, of Ossett, to be the judge of the performance. If the above task is not performed, the horse is hereby sold to the said John Brogden for the sum of 1*s.*, which he has this day paid to me. Witness our hands this 27th day of February, 1835. THOMAS MARRIOTT, JOHN BROGDEN."

A verdict having been obtained for plaintiff,

Cresswell obtained a rule *nisi* to arrest the judgment, on the ground that the agreement was in effect a wager, illegal under the statute 9 Ann. c. 14 (2), which enacts that "all notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repaying any money knowingly lent, or

(1) Cp. *Rourke v. Short* (1856) 25 L. J. Q. B. 196. (2) See note on next page.

BROGDEN advanced for such gaming or betting as aforesaid, or lent or
 MARRIOTT. advanced at the time and place of such play, to any person
 [*89] or *persons so gaming or betting as aforesaid, shall be utterly
 void, frustrate, and of none effect, to all intents and purposes
 whatsoever."

Alexander and Milner shewed cause :

This is not a wager, but *bonâ fide* a conditional bargain : the plaintiff might have objects in view for the accomplishment of which a horse might to him be worth 200*l.*, and yet be utterly worthless unless he could insure the pace of eighteen miles an hour. Suppose the case of a mine which would prove of great value with the aid of a steam engine which could raise and discharge 200 gallons of water in a minute, but worthless with an engine which would discharge no more than 190 gallons in the same time : might not the proprietor lawfully engage to pay a higher price for an engine which should accomplish the task, on condition that he should pay nothing if the engine failed ?

Bayley, in support of the rule :

The declaration discloses no object for which a horse that should trot eighteen miles an hour would be more valuable to the plaintiff than a horse which should trot seventeen. In effect, therefore, the price of the horse depends on a game or wager illegal under 9 Ann. c. 14 (1). If that game be termed a horse race, it is illegal under 16 Car. II. c. 7 (1).

TINDAL, Ch. J. :

If, on the face of this record, the contract declared on appears to be within the mischief and against the statute of 9 Ann. c. 14 (1), the action cannot be maintained. The intention of the contract appears to be plain : if it had admitted of any doubt, the question might have been raised on the record by a plea tendering an issue, whether the contract was entered into contrary to the form of the statute or not : and in order to arrest the judgment, it must, no doubt, appear by *necessary

[*90]

(1) Repealed by the Gaming Act, s. 18 of that Act; and the Gaming 1845 (8 & 9 Vict. c. 109). See now Act, 1892 (55 & 56 Vict. c. 9).—R. C.

inference on the record that the contract is contrary to the statute.

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Now the contract appears to be a sale of a horse for a conditional price: but what is the condition? The horse is sold for 200*l.*, provided he trots eighteen miles within one hour; but if that task is not performed, he is sold for 1*s.* Upon the event, therefore, of that trotting match against time, it would depend whether the plaintiff should gain a horse for 1*s.*, which, according to his own agreement, was worth 200*l.* if he performed the task; and if he failed by never so little, the plaintiff was to gain him for 1*s.* On the other hand, the defendant's property was staked on the same bargain. I cannot see the bargain in any other light than that the price was to be determined by a condition which turned on a trotting match against time. If it had depended on any innocent event, not prohibited by statute, the case had been different, and might have fallen within the principle which might govern a contract for a steam engine of given powers: but this is a wager on a game in which more than 10*l.* is at stake, and therefore falls within the statute of 9 Ann. c. 14.

PARK, J. concurred.

GASELEE, J.:

I am not prepared to say that judgment ought to be arrested upon these pleadings: I think it ought to have been left to the jury to say whether this was a device to elude the statute of Ann. And I am a little fortified in that opinion by the case of *Lynall v. Longbothom* (1), where it was held that a foot-race was a game within the statute 9 Ann. against gaming, but it must appear that a man was playing at such game, or else a wager above 10*l.* laid upon his side was not *a betting within the statute: and WILLES, Ch. J. said, "it is neither laid in the declaration, nor stated in the case, that he was playing at a game called a foot-race; and we can intend nothing that does not appear. There must be a betting on the side of a person playing; and if no case had been stated, the judgment must have been arrested upon this declaration, because it is not laid

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(1) 2 Wils. 36.

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that Clarke was playing. I think this is a penal law, and not merely remedial: as it does not appear that Clarke was playing at any game, there could be no betting on his side within the statute; so the *postea* must be delivered to the defendant, and he must have the costs of a nonsuit." The great difference between the sums in the present contract might induce the jury to say that it was a wager. But suppose the sums had been nearer;—suppose there had been only 10*l.* difference between them: it would be difficult to say that without more such a contract would be within the statute: and where is the line to be drawn?

VAUGHAN, J.:

I agree in thinking that judgment ought to be arrested. I might be of a different opinion if the intention of the parties were doubtful on the record; but it is so clear, that it is impossible to treat this contract as any thing else than a wager on an illegal game in the way of a trotting race.

Rule absolute.

1836.
 June 13.
 —
 [99]

LEUCKHART *v.* COOPER AND ANOTHER (1).

(3 Bing. N. C. 99—109; S. C. 3 Scott, 521; 2 Hodges, 150; 6 L. J. (N. S.) C. P. 131; at N. P. 7 C. & P. 119.)

A custom for public warehousekeepers in London to have a general lien on all goods from time to time housed in the warehouses, for and in the name of the merchants or other persons by whom the public warehousekeepers are employed, for all monies or any balance thereof due from the merchants or other persons to the warehousekeepers for expenses incurred by the warehousekeepers about goods consigned from abroad:

Held ill, on motion to enter judgment *non obstante veredicto*.

In trover for sundry bales of wool, the defendants, warehousekeepers, who had received the wool of one Heilbron as factor for the plaintiff, a foreign merchant, justified the retaining and holding of eleven bales of wool, parcel of the quantity claimed in the declaration, under a plea, that long before and at the

(1) Cited in judgment of the Court 54, 79, 52 L. J. Ch. 881, 891 (varied delivered by LINDLEY, L. J., in on appeal, 10 App. Cas. 617).—R. C. *Kaltenbach v. Lewis* (1883) 24 Ch. D.

time of the committing of the grievances in the declaration mentioned, the defendants were public warehousekeepers, and the trade of public warehousekeepers during all the time aforesaid exercised and carried on in the city of London; that in the course of exercising and carrying on the said trade or business of public warehousekeepers they, the defendants, were retained and employed by merchants and other persons of the city of London to enter at the custom-house at and for the port of London goods consigned from abroad, and afterwards to land such goods, and to house the same at and in the warehouses of the defendants, for and in the name of such merchants or other persons, subject to their order, for certain reasonable reward to the defendants in that behalf, they, the defendants, paying, if required by such merchants or other person so to do, the duties and customs by law imposed and charged upon such goods consigned from abroad to London; and also paying, if required so to do by the said merchants *or other persons, the freight and other charges payable in respect of the conveyance of such goods to the port of London aforesaid: that there was, and, from time whereof the memory of man runneth not to the contrary, hath been, and still is, a certain ancient and laudable usage and custom in the trade of public warehousekeepers in the city of London, for all public warehousekeepers to have and be entitled to a general lien upon all goods from time to time housed, or remaining in the warehouses of such public warehousekeepers, for and in the name of the merchants or other persons by whom such public warehousekeepers are retained and employed as aforesaid, for all monies, or any balance thereof, remaining due from such merchants or other persons to such warehousekeepers, for or on account of any advances or expenses which such public warehousekeepers have made or have been put to in and about paying the duties and customs by law imposed and charged on goods consigned to such merchants and other persons, from abroad, if required to do so as aforesaid, and in and about paying, if required so to do, by the said merchants or other persons, the freight and other charges for the conveyance of such goods to the port of London aforesaid, and also for and on account of all and every the

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advances, charges, and claims which such public warehouse-keepers shall have made, or have been put to, or to which they may be entitled, for and in respect of the entering, landing, and warehousing such goods at and in the warehouses of such public warehousekeepers as aforesaid: that while the defendants were such public warehousekeepers as aforesaid, to wit, on the 1st of January, 1838, and on divers times and occasions between that day and the 10th of October, 1834, one Edward Heilbron, merchant, in the city of London, received divers, to wit, 200 bales of wool, shipped and *consigned from abroad; and that the said Edward Heilbron, on divers times and occasions during the time aforesaid, was possessed of divers, to wit, twelve bills of lading of the said wools, deliverable by the permission and consent of the plaintiff to order, whereby the said Edward Heilbron was enabled to and did, on the times and occasions aforesaid, hold himself out as the true owner of the said last-mentioned wools: and the said Edward Heilbron, being so possessed of the said bills of lading, and being enabled to hold, and so holding himself out as the true owner of the said bales of wool, afterwards, and on the said several times and occasions aforesaid, delivered the said bills of lading to the defendants, and then retained and employed the defendants to enter at the custom-house at and for the port of London, for the said Edward Heilbron, the said bales of wool in the said bills of lading mentioned and described (of which bales of wool the said bales of wool in the introductory part of this plea referred to were part and parcel), and afterwards to land the said wools, and house the same at and in the warehouses of the defendants, for and in the name of the said Edward Heilbron, subject to his order, for certain reasonable reward to the defendants in that behalf, they the defendants paying the entries and customs by law charged and imposed on such goods: and the said Edward Heilbron, on the several times and occasions aforesaid, then requested the defendants to pay the duties, the freight, and other charges, for the conveyance of the said wools to the port of London aforesaid. That, in pursuance of such retainer and employment, and believing the said Edward Heilbron to be the owner of the said wools, they the defendants, as such public

warehousekeepers, did, on the several times and occasions aforesaid, accordingly enter at the custom-house at and for the port of London, for and as the *property of the said Edward Heilbron, the said wools, and did pay the duties and customs by law charged and imposed on such wools, and also the freight and other charges for the conveyance of such wools to the port of London aforesaid; and afterwards, to wit, on the several times and occasions aforesaid, did land the said wools, and did house the same for and in the name of the said Edward Heilbron at and in the warehouse of the defendants, subject to the order of the said Edward Heilbron. That the duties and customs, freight, and other charges so advanced and paid by the defendants as aforesaid, for and in respect of the said wools, and the other advances, charges, and claims, which the defendants, as such public warehousekeepers as aforesaid made, were put to and were entitled to for and in respect of the entering, landing, and housing the said wools as aforesaid, amounted in the whole to a large sum of money, to wit, the sum of 2,000*l* ; and that a great part thereof, to wit, the sum of 1,030*l*. 13*s*. 5*d*., before the time of committing the said grievances, was due and owing from the said Edward Heilbron to the defendants, and still was due and unpaid to the defendants. That the defendants, as such public warehousekeepers as aforesaid, on divers times and occasions during the time last aforesaid, did deliver the greater part of the said 200 bales of wool to the order of the said Edward Heilbron; and that the residue of the said wools, to wit, eleven bales thereof, being the said eleven bales of wool in the introductory part of this plea referred to, and parcel of the said wools in the declaration mentioned, before and at the time of the committing of the said several grievances, were, and still are, lying, being, and remaining in the warehouse of the defendants. That the defendants, as such public warehousekeepers as aforesaid, by virtue and according to the said usage and custom of the trade of public warehousekeepers in *the city of London aforesaid, before and at the time of the committing of the said grievances, retained and held the said last-mentioned bales of wool, parcel, &c., as and by way of a general lien for the said last-mentioned sum of 1,030*l*. 13*s*. 5*d*., so due and owing

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from the said Edward Heilbron, and still unpaid to the defendants as aforesaid: which was the said conversion of the said eleven bales of wool, parcel, &c., in the introductory part of this plea referred to: and that, the defendants were ready to verify, &c.

A verdict having been found for the defendants on this plea,

Wilde, Serjt. moved to enter judgment for the plaintiff, *non obstante veredicto*, on the ground that the custom relied on was unreasonable, and could not be supported in law. The defendants relied chiefly on *Naylor v. Mangles* (1) and *Spears v. Hartly* (2), which establish in favour of wharfingers a similar right of lien. But the case of a wharfinger is distinguishable in many respects. It is not open to every man to set up a wharf: the Crown has a superintending control: *Stephen v. Coster* (3): and a lien arises only out of an express or implied contract,—an implication that, after notice of the usage, the owner agrees to the detention of the goods: but, according to the principle established by *Oppenheim v. Russell* (4) and *Rushforth v. Hadfield* (5), no such implication arises against a third party. The lien can be asserted only against the bailor himself; and every attempt to extend liens beyond the interest of the bailor has failed. Thus in *Wright v. Snell* (6) a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective *owners. Goods having been sent by the carrier addressed to the order of a mere factor, it was held, that the carrier had not, as against the real owner, any lien for the balance due from the factor. *Butler v. Woolcott* (7), *Holderness v. Collinson* (8), *Richardson v. Goss* (9), and *Stephen v. Coster* (10) are to the same effect.

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A rule *nisi* having been granted,

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| (1) 5 R. R. 722 (1 Esp. 109). | (7) 9 R. R. 615 (2 Bos. & P. |
| (2) 6 R. R. 814 (3 Esp. 81). | (N. R.) 64). |
| (3) 1 W. Bl. 413, 423. | (8) 31 R. R. 174 (7 B. & C. |
| (4) 6 R. R. 604 (3 Bos. & P. 42). | 212). |
| (5) 8 R. R. 520 (6 East, 519; | (9) 6 R. R. 727 (3 Bos. & P. |
| 7 East, 224). | 119). |
| (6) 24 R. R. 413 (5 B. & Ald. 350). | (10) 1 W. Bl. 413, 423. |

Cresswell and *R. V. Richards* shewed cause :

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The verdict of the jury decides that the custom actually exists; and it would not have been suffered to grow up or continue if it had been found inconvenient or unreasonable. It is for the party who impugns the custom, therefore, to shew that it is unreasonable or illegal; and it ought to be supported, unless valid grounds can be assigned for departing from it. In *Hix v. Gardiner* (1) COKE, Ch. J. says, “For some things no reason can be given; and the rule is, *qui rationem in omnibus querit, rationem destruit*.” But there is nothing unreasonable in this custom, nor can any material distinction be pointed out between the case of wharfingers and that of warehousekeepers. In *Wright v. Snell* it was sought to enforce a carrier’s lien upon goods consigned to the order of a factor, for a general balance due to the carrier from the factor. The defendants here seek to enforce their lien for charges on the particular goods, against the principal of the agent who deposited the goods; and the liability of the principal ought to be coextensive with that of his agent. In *Oppenheim v. Russell* and *Richardson v. Goss*, the question, as in *Wright v. Snell*, arose between the wharfinger and a purchaser of the goods; not the bailor, or the principal of the bailor. There is nothing in *Rushforth v. Hadfield* *or *Aspinall v. Pickford* (2) to shew such a custom to be unreasonable. But in *George v. Clagett* (3) it was held, that if a factor who sells under a *del credere* commission, sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off any demand he may have on the factor against the demand for the goods made by the principal; and there is as much convenience in the present custom as in that. A foreign merchant must be presumed to inquire into the rules of mercantile law in England before he makes his consignment. If he omits to do so, he must bear the consequence of his own omission. In *Foster v. Pearson* (4) the Judge directed the jury that the principle laid down in *Haynes v. Foster* (5),—that a bill broker who receives a bill from a customer to procure it to be discounted, has no right

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(1) 2 Bulstr. 196.

(2) 3 Bos. & P. 44, *n*.

(3) 4 R. R. 462 (7 T. R. 359).

(4) 40 R. R. 744 (1 C. M. & R. 849).

(5) 40 R. R. 755 (2 Cr. & M. 237).

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to mix it with bills of other customers, and to pledge the whole mass as a security for an advance of money to himself, and that still less has he a right to deposit such bill as a security, or part security, for money previously due from him,—was to be taken by them as the general law; but that, notwithstanding such general rule of law, the parties might contract as they thought proper; and he left it to the jury to say whether the usage set up by the defendants as to the course of dealing in such cases was established to their satisfaction, and if so, whether they thought that the plaintiff, who was a bill broker himself, had contracted with reference to that usage; and the jury having found for the defendants, the Court refused to disturb the verdict.

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Atcherley, Serjt. and *W. H. Watson* in support of the rule, relied on *Stephen v. Coster*, as shewing the grounds of distinction between the cases of wharfinger and warehousekeeper. *In addition to the cases cited on moving for the rule, they referred to *Maanss v. Henderson* (1), where Lord KENYON said, “If the agent disclose his principal at the time, it is clear that he cannot pledge the property of such principal to another with whom he is dealing for his own private debt;” and contended that this was not a case in which Heilbron was authorised as a factor to pledge the goods in his hands, by virtue of 6 Geo. IV. c. 94 (2).

Cur. adv. vult.

TINDAL, Ch. J. :

The jury having found a verdict in this case for the defendants, upon the issue raised upon the second plea, the plaintiff has moved for judgment *non obstante veredicto*. The question therefore is, whether the custom stated in that plea is a custom that can be supported in law.

The plea justified the retaining and holding of eleven bales of wool, parcel of the quantity claimed in the declaration, under an ancient custom from time immemorial used in the trade of public warehousekeepers in the city of London, for all such public

(1) 1 East, 335, 337.

see the Factors (Scotland) Act, 1890

(2) Repealed by the Factors Act,
1889 (52 & 53 Vict. c. 45, s. 14), and

(53 & 54 Vict. c. 40).—R. C.

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warehousekeepers to have and be entitled to a general lien upon all goods from time to time housed or remaining in their warehouses, for and in the name of the merchants or other persons by whom such public warehousekeepers are retained or employed, for all monies, or any balance thereof, due from such merchants or other persons to such public warehousekeepers, for or on account of advances or expenses which such public warehousekeepers should have made or been put to, in or about the paying of duties, or of customs on goods consigned to them from abroad, or the payment of freight and other charges for the conveyance of such goods to *the port of London, or the entering, landing, and warehousing such goods. So that the general lien claimed is not confined to goods the property of the person who employed or retained the warehousekeeper, but extends to all goods which are put by him in his own name into the hands of the warehousekeeper, whether his property or not. The custom set up in the plea, if supportable, would make the goods of a foreign merchant, which have been consigned to a London factor for sale, and by him put into the warehouse of the warehousekeeper for safe custody, liable to a private debt of the factor, for expenses incurred in respect of other goods of third persons which had been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that, to an unlimited extent. It appears to us, that such a custom is at once unreasonable and unjust, and, therefore, bad in law. It is a custom which is obviously prejudicial, in a direct manner, and in a very high degree, to foreign trade ; for no foreign merchant would be content to consign his goods to this country for sale, if they could be made liable, whilst warehoused for the purpose of custody, to satisfy a debt already due from the factor to the warehousekeeper in respect of other goods. No authority whatever has been cited in support of this custom ; and as far as any analogy can be drawn from decided cases, it is against its validity. The case of *Oppenheim v. Russell* (1) establishes the principle, that, although a common carrier may have acquired by usage or special agreement a lien for a general balance of account between him and a consignee this lien shall not affect the right of the

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(1) 6 R. R. 604 (3 Bos. & P. 42).

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consignor to stop *in transitu*: that is, in effect, that this right of general lien shall not operate upon or *against the rights of third persons. And the doctrine laid down in *Wright v. Snell* (1) bears still more closely upon the point now under discussion; a general lien being held not sustainable by a carrier against the true owner of the goods for the general balance due from the factor to whom the goods were consigned for sale. That case, in effect, decides the present; for no sound distinction can be taken in this respect between a public warehousekeeper and a public carrier, except, indeed, that the latter stands in a position more favoured by the law in respect to lien than the former; the carrier being obliged by law to receive and carry the goods, whilst the warehousekeeper's claim arises out of a voluntary contract. And the the present case appears to us to differ from that of *George v. Clagett* (2), principally relied on by the defendants. In that case the owner put his goods into the hands of his factor to sell as his own; the factor sold them as his own, and the defendant had no knowledge that the factor was not the real owner of the goods: in such case the set-off of the debt due from the factor to the purchaser followed as a necessary consequence from the sale by him as of his own goods. But in this case there was no sale by the factor; but the proposition contended for is, that the goods became, by the operation of the custom, pledged for the factor's debt, though the factor was not authorised by law so to pledge them directly. And although the factor may now, under some circumstances, pledge, the facts of the present case do not bring it within the operation of the statute 6 Geo. IV. c. 94.

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It is unnecessary, as a further objection to the custom set up by this plea, to observe that it is pleaded so largely as to comprehend all goods put into the hands of a warehousekeeper by a factor in his own name, *whether or not the warehousekeeper has knowledge or notice that they are not the property of the factor, but of the foreign merchants. But, without relying on this objection, we think the custom unreasonable, and therefore bad upon the more general ground above stated, and therefore give our judgment for the plaintiff, *non obstante reredicto*.

Judgment for the plaintiff accordingly.

(1) 24 R. R. 413 (5 B. & Ald. 350).

(2) 4 R. R. 462 (7 T. R. 359).

MELLIN *v.* TAYLOR.

(3 Bing. N. C. 109—112; S. C. 3 Scott, 513; 2 Hodges, 125; 5 L. J. (N. S.) C. P. 346.)

1836.
June 13.
[109]

A jury having found a verdict for the defendant in an action of crim. con., the Court granted a new trial on the ground that the verdict was against the weight of evidence, notwithstanding there was some evidence for the defendant.

THIS was an action to recover damages for criminal conversation with the plaintiff's wife. The plaintiff was a manufacturer, the defendant an attorney: both apparently opulent.

At the last Yorkshire Assizes, before Lord Denman, Ch. J., the case proved against the defendant shewed, in substance, that, in violation of a promise given by him to the plaintiff, he had been repeatedly in company with the plaintiff's wife during the plaintiff's absence. A boy and man deposed to an act of criminal intercourse by daylight, on a stile in a public footpath: the defendant was proved to have admitted that upon that occasion he had been at the stile in company with the plaintiff's wife; he denied the act imputed; but accounted for his being in the lady's company by a statement which was proved to be false. A female servant deposed to another act of criminal intercourse under improbable circumstances in the plaintiff's library. Another female servant, whose reputation for chastity, however, would not bear examination, said she saw the defendant come out of a dark closet in the plaintiff's breakfast-room. A groom and his companion, who were on the watch, said they saw the plaintiff's *wife, during the plaintiff's absence, let the defendant into the house at half after eleven at night, with his boots in his hand: at two in the morning he went away with his boots on. And a butcher said he saw the defendant go with the plaintiff's wife into a stable, and remain there half an hour. For the defendant, seventeen witnesses were called, the tendency of whose evidence was to shew a variety of contradictions, inconsistencies, and discrepancies, in the testimony adduced on the part of the plaintiff. But the chief topic of defence, considering the station in life of the parties, was the improbability of the acts spoken to at the stile and in the library.

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MELLIN The trial lasted two days; and a special jury having found a
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 TAYLOR. verdict for the defendant,

Wilde, Serjt. obtained a rule *nisi* for a new trial, on the ground that the verdict was against the weight of the evidence. The learned Judge who presided reported that he was not satisfied with the verdict.

Cresswell, *Alexander*, *Cowling*, and *Wortley*, shewed cause :

After relying on the improbability of the testimony given for the plaintiff, they contended that this was a case of conflicting evidence, in which the Court would not grant a new trial merely because a jury might have been warranted in giving a verdict the other way. Where there is evidence on both sides, it is not the practice to set aside a verdict because the Court may form an opinion as to the weight of the evidence different from the opinion of the jury: *Anon.* (1), *Swain v. Hall* (2), *Ashley v. Ashley* (3), *Smith v. Huggins* (4), *Carstairs v. Stein* (5), *Belcher v. Prittie* (6). To send this case to a new trial, therefore, would be an invasion of the province *of the jury, and, under circumstances so peculiar, would insure a verdict for the plaintiff; a course, for which, in trials of this kind, there was less occasion than in any other, inasmuch as an opinion upon the guilt or innocence of the accused must be formed in a great measure from the appearance and demeanour of the witnesses, of which the jury were spectators, but of which the Court above must be entirely ignorant.

Wilde was heard in support of the rule, and the Court took time to consider.

Cur. adr. vult.

TINDAL, Ch. J. :

We agree, that in every case in which the verdict has turned upon a question of fact which has been submitted to a jury, and there is no objection to the verdict, except that it is found, in the

(1) 1 Wils. 22.

(2) 3 Wils. 45.

(3) 2 Str. 1142.

(4) 2 Str. 1142.

(5) 4 M. & S. 192.

(6) 38 R. R. 486 (10 Bing. 408).

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opinion of the Court, against the weight of the evidence, the Court ought to exercise, not merely a cautious, but a strict and sure judgment, before they send the case to a second jury. The general rule under such circumstances is, that the verdict, once found, shall stand: the setting it aside is the exception, and ought to be an exception of rare and almost singular recurrence. The argument before us has gone the length of contending that if we send this case to a second trial we invade the province of the jury, and, in the particular instance before us, almost insure a verdict against the defendant. I cannot conceive how the benefit of trial by jury can be in any way impaired by a cautious and prudent application of the corrective which is now applied for: on the contrary, I think that, without some power of this nature residing in the breast of the Court, the trial by jury would, in particular cases, be productive of injustice, and the institution itself would suffer in the opinion of the public. And with respect to this particular case, I *can never persuade myself that, in the cautious manner in which we express ourselves as to the former verdict, a second jury will not exercise their judgment upon the facts brought before them with as perfect freedom, and with as little bias, as if the investigation was for the first time brought before that tribunal.

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Strong observations have been made, that we cannot have the opportunity of giving an opinion on the demeanour of the witnesses at the trial. It is an observation which would apply to every case of a motion to the Court, as to some of the Judges, if not as to all. But in this case the learned Judge who presided at the trial had that opportunity; and he has reported to us that he is not satisfied with the verdict; a course which has in it no novelty whatever, but has been the constant practice from the earliest time at which new trials have been granted, and is acted upon every day. I shall, therefore, content myself with saying, that the present case appears to us, in some of its circumstances, of a very extraordinary character and nature, and that, as the evidence now stands, the verdict appears to us so much against the weight of the evidence, that before we can feel satisfied in giving the judgment of the Court for

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the defendant upon the verdict which he has obtained, we think the facts of this case ought to be reconsidered by a second jury.

Rule absolute for a new trial, on payment of costs (1).

1886.
Nov. 2.
[219]

DAY v. BONNIN.

(3 Bing. N. C. 219—222 ; S. C. 3 Scott, 597 ; 2 Hodges, 207 ; 6 L. J. (N. S.) C. P. 1.)

A cause, and all matters in dispute between the parties, being referred to arbitration, the arbitrators, “having heard the proofs and allegations of the parties touching the matters in difference between them,” awarded, “concerning the same,” that defendant should pay plaintiff 11*l.* 5*s.* in full of all demands in the cause :

Held sufficiently final.

THE plaintiff issued a writ in debt for 11*l.* 5*s.*

On the 6th of August, before any declaration had been delivered, the cause, and all matters in dispute between the parties were, under a Judge’s order, referred to arbitration.

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The arbitrator, by his award, after reciting the Judge’s order and the rule of Court thereon, and averring that he had heard the allegations and proofs and answers *of the parties, “touching the matters in difference between them,” made his award “concerning the same” as follows ; that all proceedings in the cause should cease, and that the defendant should, on the 12th of September, 1886, pay the plaintiff 11*l.* 5*s.* “in full of all demands in the cause.”

Hurlstone, upon an affidavit that two claims were urged before the arbitrator, one of which was resisted and the other admitted, moved to set aside this award on the ground that it

(1) *Wilde* moved for the rule, on an alleged misdirection, as well as on the ground that the verdict was against evidence.

Evidence had been received, without objection by the plaintiff’s counsel, of the happy terms on which the defendant lived with his own wife and family ; and the learned CHIEF JUSTICE commented on this

evidence in his summing up : but the reception of the evidence, which was admitted to be improper, not having been objected to, the Court held that the comment on it would not of itself warrant the granting a rule for a new trial.

Upon the new trial a verdict was given for the plaintiff, with 1,000*l.* damages.

was not final; having decided upon the demand in the cause only, and having omitted to determine the other matters in difference. If another action were brought in respect of those matters in difference the defendant could not set up this award as a bar.

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In *Gyde v. Boucher* (1) where a cause and all matters in difference were referred to an arbitrator, and by his award he merely directed a verdict to be entered in favour of the plaintiff for one entire sum, the award was held not final, and therefore bad.

TINDAL, Ch. J.:

It appears to me, looking at this award, sufficiently certain that the arbitrator has taken into consideration all the matters submitted to him, and has awarded on all: though he does not expressly negative that there were other matters in difference, yet we cannot read the award without seeing that he intends to do so. The submission, bearing date August 6th, is of the cause and all matters in dispute between the parties; and the arbitrator after alleging that in pursuance of the reference he has heard the allegations, proofs, and answers of the parties touching the matters in difference between them, awards concerning *the same, that all proceedings shall cease on payment of 11*l.* 5*s.* in full of all demands in the cause: leaving us to infer that there was no other matter in difference.

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In *Gyde v. Boucher* it appeared by affidavit that there were other matters and that they had not been considered. The supposed hardship as to pleading the award does not exist: for the defendant must aver and prove that the matter for which he is sued a second time has been the subject of an award, and this award would be a bar as to all matters up to the 6th of August.

GASELEE, J.:

If it had been stated on affidavit that there were other matters on which the arbitrator had not awarded, there might have been ground for a rule: but the arbitrator by alleging that he has

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heard the allegations and proofs of the parties touching the matters in difference between them, and has awarded "concerning the same," that the defendant shall pay a certain sum, sufficiently shews that no other question was brought before him.

VAUGHAN, J. concurred.

BOSANQUET, J. :

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The cause and all matters in dispute are referred : and when the arbitrator awards "concerning the same," that the defendant shall pay a certain sum, in full of all demands in the cause, he shews sufficiently that no other question was before him. The language of Lord TENTERDEN in *Pearse v. Pearse* (1) is very apposite. "There was in this case a submission of an action at law, a suit in equity, and of all matters in difference between the parties or either of them. The arbitrator has adjudicated upon the *action at law, by ordering the defendants to pay the plaintiff a sum of money ; he has adjudicated upon the suit in equity, by ordering the bill to be dismissed, and each party to pay his own costs. It does not appear that there was any matter in difference, between the defendants in the action and T. Pearse, not included in the suit in equity. The question whether the 500*l.* was a gift or a loan, was a matter included in the suit in equity. Then if there were no matters in difference between the parties, besides those included in the action at law, and the suit in equity, the arbitrator, by his award, has decided upon these matters. The award, therefore, is good, and the rule must be discharged."

Rule refused.

(1) 9 B. & C. at p. 488.

JOHNSON AND ANOTHER *v.* WINDLE AND ANOTHER (1).

(3 Bing. N. C. 225—229; S. C. 3 Scott, 608; 2 Hodges, 202; 6 L. J.
(N. S.) C. P. 5.)

1836.
Nov. 8.
[225]

A promissory note delivered by defendant to plaintiff, payable to plaintiff's order, was stolen from plaintiff by his clerk, who, after forging plaintiff's indorsement, obtained payment of the defendant's banker: the banker handed the note to the defendant:

Held, that plaintiff was entitled to recover the amount at the hands of defendant in an action of trover, notwithstanding six weeks had elapsed before plaintiff discovered and gave defendant notice of the loss of the note.

THIS was an action of trover to recover the value of the promissory note, set out as follows:

“MILFORD WHARF, LONDON, 30th March, 1835.

“Sixty days after date, we promise to pay C. Johnson and Sons, or order, 30*l.* value received in coals, ex ship *Two Brothers*, at Messrs. Gosling and Sharpe.

“W. and C. WINDLE.”

The declaration was in the usual form, and alleged that the plaintiffs were lawfully possessed of the note as of their own property.

The defendants pleaded, first not guilty; secondly, that the plaintiffs were not lawfully possessed as of their own property of the said promissory note in manner and form as the declaration alleged.

Upon these pleas issues were joined.

By order of a Judge, and consent of the parties, the following facts were stated in a special case for the opinion of the Court.

The defendants were the makers of the promissory note above set forth, and the plaintiffs were the payees therein mentioned.

The note in question was made and drawn by the defendants on the day of its date, and delivered by them to the plaintiffs in the usual course of business, in part payment for part of a cargo of coals ex ship the *Two Brothers*.

The note was afterwards stolen from the plaintiffs; and at the time it was so stolen there was no indorsement upon it.

On the day when it became due, Messrs. Wilkins were holders

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(1) See now Bills of Exchange Act, 1882, s. 24.—R. C.

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of the said note for value, and the same was presented by a clerk of Messrs. Glyn & Co., bankers in London on account of the said Messrs. Wilkins to Messrs. Gosling and Sharpe, for payment, who, as the defendant's bankers, paid the note and debited the defendant's account with the sum paid. The note was afterwards handed over to the defendants, in whose possession it still remained.

Upon the delivery of the note to the defendant by Messrs. Gosling and Sharpe, and whilst it remained in the defendants' possession, and before the commencement of this suit, the plaintiffs demanded the note of the defendants, but they refused to give it up. Afterwards the present action was commenced.

The promissory note was never indorsed by the plaintiffs, or by their authority, nor was any person ever authorised by them to receive the amount thereof. At the time when the note was handed over to the defendants, the following indorsements appeared upon the back of it.

“ By C. Johnson and Sons to Mr. John Atkin,

“ JOHN ATKIN,

“ GEORGE WRIGHT.”

All the indorsements on the notes were forgeries in the handwriting of one George Wryghte, who, at the time the note was made and delivered to the plaintiffs, and for some time afterwards, was a clerk in their employ. The note was stolen from the plaintiffs by the said G. Wryghte, whilst he was in their service.

The defendants had no notice that the indorsement of “C. Johnson and Sons,” was a forgery at the time their bankers Messrs. Gosling and Sharpe paid the note, nor till six weeks afterwards, when notice was given to the defendants of that fact upon the plaintiff's first discovering that the note had been stolen.

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If the Court upon the circumstances above stated, should be of opinion that the plaintiffs were entitled to the property, and to the possession of the note when the same was demanded as aforesaid, and that there was sufficient evidence of a conversion by the defendants, the pleas were to be withdrawn, and judgment was to be entered for the plaintiffs by confession, damages

30*l.* and interest, together, with their costs and charges of this suit. But

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If the Court should be of opinion that the plaintiffs were not so entitled, or that there was not sufficient evidence of a conversion, then judgment of *nolle prosequi* was to be entered.

Channell, for the plaintiffs :

The property in this bill which was vested in the plaintiffs has never been divested, and the refusal to deliver up the bill after demand constitutes a conversion, for which the defendants are liable in trover. Nor can the defendants justify their refusal to deliver the bill, on the ground of any alleged negligence on the part of the plaintiffs. With one exception, all the cases in which such negligence of the owner has been holden to constitute a defence to the holder of chattels, the chattel has been such as passed by delivery. This bill could not pass without the authority of an indorsement ; and under such authority there has been no payment, either by the bankers or the defendants. In *Smith v. Shepperd* (1), the note, when lost, was indorsed in blank. But *Cheap v. Harley* (2), *Mead v. Young* (3), and *Forster v. Clements* (4) shew, that if a banker pays without ascertaining the indorsement to be genuine, it is at his own risk. If there has been no authorised payment, the defendants had no *right to receive the bill from the bankers, and having done so, are as much liable to action as a party who receives the goods of a bankrupt after bankruptcy.

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Bayley, for the defendants :

The defendants paid the bill to a holder for value ; and if that was not a valid payment, at least it was not so clearly void as to entitle the plaintiffs to throw the loss on the defendants. The Court will distinguish between securities for money, and currency ; as in *Lang v. Smyth* (5), where the plaintiff's Neapolitan bonds having been fraudulently paid by his agent to defendant, and the jury having expressly found that the defendant did not act with due caution, the Court refused to disturb a verdict for the

(1) Chitty on Bills, 8th ed. 429.

(3) 2 R. R. 314 (4 T. R. 28).

(2) 3 T. R. 127, cited in *Allen v. Dundas*.

(4) 11 R. R. 650 (2 Camp. 17).

(5) 33 R. R. 482 (7 Bing. 284).

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plaintiff. The instrument in this case was negotiable by indorsement; the defendants had no means of knowing the authenticity of the indorsement; and the plaintiffs are chargeable with gross negligence in permitting it to be stolen by their own clerk, and allowing six weeks to elapse before they discovered their loss: they ought not, therefore, to be allowed to cast the loss on the defendants, at all events not till they have prosecuted the thief. In *Morrison v. Buchanan* (1), it appearing that it was the regular and usual course of business in commercial transactions, to deliver out a bill of exchange, left for acceptance, to any person who mentioned the amount and described any private mark or number upon it; it was held that if the clerk of the party leaving it, by his conduct should enable a stranger to discover the mark or number, in consequence of which the bill should be delivered out, the owner could not maintain trover for the bill against the party who so delivered it out.

TINDAL, Ch. J. :

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It would be of most dangerous consequence if we were to give legality to a forged indorsement *of a bill of exchange, and that would be the effect of a judgment in favour of these defendants.

The general rule is, that no title can be obtained through a forgery. Here the indorsement upon the bill has been forged, and the only ground which has been urged to take the case out of the general rule, is, that there has been such gross negligence in the plaintiffs as to divest them of any remedy against the defendants. But for aught that appears on this case they may have acted with sufficient caution to exclude any such ground of defence. If such negligence were to be the defence relied on, it should have been stated in the case.

GASELEE, J. :

In the case relied on for the defendants, it was expressly found that there had been gross negligence on the part of the plaintiff.

VAUGHAN, J. :

The plaintiffs have fulfilled all the requisites to enable them

(1) 6 Car. & P. 18.

to maintain an action of trover: and no fact is stated from which negligence can be inferred. It differs therefore entirely from the case in which negligence was expressly found.

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BOSANQUET, J.:

I am of the same opinion. This instrument on the face of it, was marked as the property of the plaintiffs. By an indorsement which is a nullity, it has found its way into the hands of the defendants: it has been demanded of them, and refused: and that affords sufficient ground for an action of trover.

Judgment for plaintiffs.

JOSEPH PROLE AND WILLIAM STEILE, ADMINISTRATORS OF W. S. ANDREWS, DECEASED, v. WIGGINS.

(3 Bing. N. C. 230—235; S. C. 3 Scott, 601; 2 Hodges, 204; 6 L. J. (N. S.) C. P. 2.)

1836.
Nov. 8.

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To debt on bond the defendant pleaded that the bond was given in pursuance of a corrupt agreement that the defendant should serve the obligee as an apprentice to the business of surgeon, apothecary, and man-midwife, for two years, and that the agreement should be antedated to make it appear he had served five years, in order that by such corrupt contrivance he might be admitted to his examination for the business of an apothecary at the end of two years instead of five, as required by statute.

A verdict having been found for the defendant, the Court refused to enter judgment for the plaintiff *non obstante veredicto*, which was moved for on the ground that it appeared to be the object of the parties to enable the defendant to practise as a surgeon also, and that a five years' apprenticeship was not required for the business of a surgeon; and that it was not open to the defendant to object to the legality of his own bond.

To debt on bond, conditioned to pay to W. S. Andrews the sum of 200*l.* with interest, the defendant pleaded,

That the said W. S. Andrews before and at the time of making the said writing obligatory, used, exercised, and carried on the art, mystery, and profession of a surgeon, apothecary, and man-midwife, and that before the making of the said supposed writing obligatory, to wit on the 10th of July, 1828, it was unlawfully and corruptly agreed by and between the said W. S. Andrews

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and the defendant, that the said W. S. Andrews should take George Henry Wiggins, son of the defendant, as his apprentice to learn the art, mystery, or profession of surgeon, apothecary, and man-midwife, for the term and space of two years only; but that in and by certain articles of agreement of apprenticeship, to be made and entered into by and between the said W. S. Andrews and the defendant and his son G. H. Wiggins, it should be stated and be made to appear, that it had been agreed by and between the said parties thereto, that the said G. H. Wiggins had been and was articulated to *the said W. S. Andrews for the term of five years as his apprentice; and for that purpose that such articles of agreement should be antedated; in order that by such corrupt contrivance the said parties to the said agreement might fraudulently and illegally procure the said G. H. Wiggins to be admitted to examination, for the purpose of practising as an apothecary upon serving an apprenticeship for two years, instead of an apprenticeship of five years, as required by the statute in such case made and provided; and it was also then agreed between the parties aforesaid, that the defendant should pay to W. S. Andrews the sum of 200*l.* at the end of two years from the time his son G. H. Wiggins should go to the said W. S. Andrews, together with interest for the same from the day G. H. Wiggins should actually go into the service of W. S. Andrews; which said sum of 200*l.* and interest should be secured by the said bond or obligation. That, in pursuance of such corrupt contract and unlawful agreement so made as aforesaid, the said G. H. Wiggins afterwards, to wit, on the 15th of July, 1828, at, &c. entered into the service of the said W. S. Andrews as his apprentice as aforesaid and for the purpose aforesaid, and continued in such service for the space of two years from the day and year last aforesaid. That in pursuance, and in consideration of such unlawful and corrupt contract and agreement so made as aforesaid, to wit, on the 23rd of March, 1829, the said bond or writing obligatory, was executed and delivered by the defendant to the said W. S. Andrews, and certain articles of agreement were then, to wit, on, &c., also made by and between the defendant of the first part; the said G. H. Wiggins of the second part; and W. S. Andrews of the

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third part ; and the same were antedated the 15th of July, 1825 ; which said articles of agreement, sealed with the respective seals of the defendant *and W. S. Andrews were had, taken, and kept by said W. S. Andrews, and therefore could not be produced by the defendant ; and in and by the said articles of agreement, it was falsely and fraudulently recited, that it had been agreed between the several parties thereto, that the said G. H. Wiggins should be articted to the said W. S. Andrews for the term of five years as an apprentice ; and in and by the said articles of agreement it was also, amongst other things, falsely, unlawfully, and corruptly witnessed, that the said W. S. Andrews should and would for and during the term of five years, teach and instruct, or cause to be taught and instructed, the said G. H. Wiggins in the art, mystery, or profession of a surgeon, apothecary, and man-midwife, and at the end of the said term, do all such acts as might and should be needful for the facilitating G. H. Wiggins being duly admitted as a regular and qualified surgeon, and as in such cases was usual : and further in and by the said articles of agreement it was made to appear that G. H. Wiggins consented and agreed to become and be, and did thereby bind himself duly to serve the said W. S. Andrews as his apprentice in the art, mystery, or profession aforesaid from the day of the date thereof, for the said term of five years ; whereas in truth and in fact the said articles of agreement were not made or executed by the said several parties thereto on the 15th of July, 1825, but were really and actually made and executed by them respectively with such object and in pursuance of such corrupt agreement as aforesaid at a subsequent time, to wit, on the 23rd of March, 1829 ; wherefore the said supposed writing obligatory became and was wholly void in law ; and that, the defendant was ready to verify, &c.

A verdict having been found for the defendant on this plea,

Storks moved to enter judgment for the plaintiffs *non obstante revedicto*, on the ground that though a five years' apprenticeship was necessary to entitle a party to practise as an apothecary under 55 Geo. III. c. 194, s. 15 (1), yet as he might

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(1) See note on p. 625.

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practise in the capacity of a surgeon without an apprenticeship, if that were intended to be the principal business, and the other only as ancillary to it, the bond might be good to secure payment for instruction in the art of surgery: at all events it was not open to a party to the bond to take the objection. In *Doc d. Roberts v. Roberts* (1) it was held that no man can be allowed to allege his own fraud to avoid his own deed; and, that therefore, where a deed of conveyance of an estate from one brother to another, was executed to give the latter a colourable qualification to kill game, as against the parties to the deed, it was valid, and was sufficient to support an ejectment for the premises. In *Armstrong v. Lewis* (2), where A. and B. carried on the business of a pawn-broker, in partnership, under a deed, the business was conducted solely by A., and his name alone appeared over the shop door, and upon the printed tickets and duplicates used by persons in that trade, and the licences contained the name of A. only, the Court inclined to think, that although the parties might by that contract have rendered themselves liable to penalties imposed by the statute 39 & 40 Geo. III. c. 99, yet that there being no actual agreement for an infraction of the law, the contract was not void.

So here, there being no agreement for any infraction of the law as to the profession of a surgeon, the Court would not set aside the bond, though the parties might be liable to a penalty in respect of the business of an apothecary. In *Huws v. Leader* (3) it was held, upon *a plea of the statute of 13 Eliz. to a deed, that the defendant was not such a person as could plead that plea; and this reason was given,—that the statute makes the deed void as against the creditor, but not as against the party himself, his executors or administrators, for as against them, it remains a good deed of gift.

In *Montifiore v. Montifiore* (4) Lord MANSFIELD said, that no man shall set up his own iniquity as a defence, any more than as a cause of action: *Smith v. Garland* (5), is to the same effect.

The COURT having requested to see the pleadings,

(1) 20 R. R. 477 (2 B. & Ald. 367).

(3) Cro. Jac. 270.

(2) 39 R. R. 776 (2 Cr. & M. 274).

(4) 1 W. Bl. 363.

But see *contra*, 4 Moore & Scott, 1.

(5) 16 R. R. 154 (2 Mer. 123).

TINDAL, Ch. J. now said :

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We looked at the pleadings to see whether they contained any allegation that the object of the parties was to defeat the provisions of the statute 55 Geo. III. c. 194, s. 15 (1) ; and we find that the plea states that it was unlawfully and corruptly agreed between Andrews and the defendant that Andrews should take the defendant's son as his apprentice for two years, to learn the art, mystery, or profession of surgeon, apothecary, and man-midwife for two years, but that it should appear in the articles of agreement that the defendant's son had been articulated for five years, in order that by such corrupt contrivance the parties might fraudulently and illegally procure the defendant's son to be admitted to examination for the purpose of practising as an apothecary upon serving an apprenticeship for two years instead of five, as required by the statute. It is true the agreement adds that their object was also to facilitate the practice of the apprentice in the capacity of a surgeon ; but there is a distinct allegation in the plea, that their object was to defeat the object of the statute as to the apprenticeship required for an apothecary ; and the jury having found the plea to be true, there is no ground for entering *judgment *non obstante veredicto*. In *Doe d. Roberts v. Roberts* the defence set up was inconsistent with the deed ; but the facts pleaded here are all consistent with the deed ; and in *Collins v. Blantern* (2) it was held that a bond given by way of indemnity to one who had given his note for 35*l.* to a prosecutor on an indictment for perjury, to induce him to withhold his evidence, was void *ab initio*, and that the facts might be specially pleaded.

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Rule refused.

Storks afterwards moved that the plaintiff might be exempted from the payment of costs, on the ground that, as administrator, he was bound to sue.

Sed per CURIAM :

If you had any affidavit that the plaintiff did not know of the

(1) Repealed (as to the requirement of five years' apprenticeship) by the Apothecaries Amendment Act, 1874 (37 & 38 Vict. c. 34, s. 2).—R. C.
(2) 2 Wils. 341.

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fraud, perhaps we might have granted a rule *nisi*; but when the plea disclosed the whole transaction, the plaintiff might have abandoned his suit.

Rule refused.

1836.
Nov. 8.

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TAYLOR v. BLACKLOW (1).

(3 Bing. N. C. 235—249; S. C. 3 Scott, 614; 2 Hodges, 224; 6 L. J. (N. S.) C. P. 14.)

Defendant, an attorney, being employed to raise money on mortgage for plaintiff, disclosed to the proposed lender certain defects in plaintiff's title, *per quod* plaintiff was subjected to divers actions at the suit of the proposed lender, was delayed in obtaining the money he wanted, and compelled to give a higher rate of interest: Held, that this was a breach of duty for which an action lay against defendant, notwithstanding he had been the attorney of the proposed lender before his retainer by the plaintiff.

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THE declaration stated, that before and at the several times hereinafter mentioned the defendant was an attorney, to wit, an attorney of the Court of Common *Pleas at Westminster; and the plaintiff then claimed to be lawfully entitled to and interested in a certain estate, to wit, in certain messuages, buildings, lands, tenements, and premises with the appurtenances in the county of Kent; and before and at the time of the committing of the grievance by the defendant as hereinafter mentioned was desirous to borrow and obtain an advance of money, to wit, the sum of 4,000*l.*, by way of mortgage of and security upon the said estate and premises; whereof the defendant, before and at the time of the committing of the grievance by him committed as hereinafter stated, had notice: and thereupon, heretofore, to wit, on the 2nd of March, 1833, the defendant, so being such attorney as aforesaid, represented to the plaintiff that he had a client who would advance the said sum of 4,000*l.* on sufficient security and at a moderate rate of interest, to wit, at the rate of 4 per cent. per annum for interest on the same; and the plaintiff, at the request of the defendant, retained and employed the defendant as such attorney, to use due endeavours to obtain and procure the said

(1) Cited in the judgment of GROVE, J., in *Barber v. Stone* (1881) 50 L. J. C. P. 297.—R. C.

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sum of 4,000*l.* on such mortgage for the plaintiff, for reasonable reward to the defendant in that behalf; and the plaintiff at the request of the defendant then delivered to the defendant as such attorney, and in pursuance of the said retainer, divers, to wit, six abstracts of and relating to the title of the plaintiff, of in and to the said estate and premises, and certain other documents also relating to the same, to wit, a statement of the number of acres of which the said estate consisted, and the names of the tenants and occupiers of the same; and thereupon and by means of the premises the defendant afterwards, and before the committing of the grievance by the defendant as hereinafter mentioned, to wit, on &c., as such attorney of and for the plaintiff as aforesaid, discovered and ascertained that there was a certain defect in and objection to the legal right and *title of the plaintiff to the said estate and premises, to wit, that in two of the title deeds of and relating to the said estate and premises a part of the said estate and premises, to wit, sixty acres thereof, and certain messuages, buildings, and improvements thereon, had not been sufficiently conveyed to or for the use or benefit of the plaintiff; and that by reason and on account thereof a certain other person, to wit, John Henry Taylor, the brother of the plaintiff then had in point of law a legal right to such part of the said estate and premises, and to recover the possession of the same, although in justice and equity the beneficial interest in the whole of the said estate and premises then belonged to the plaintiff; and by reason of the premises, and under and by virtue of the said retainer and employment, it then became and was the duty of the defendant not voluntarily or unnecessarily to divulge and communicate the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said J. H. Taylor or to any other person, and not to instigate or cause to procure to be commenced or prosecuted any action or proceeding for the recovery of the said estate and premises, or any part thereof, from the plaintiff, for or by reason or on account of such discovery of the defendant by the means aforesaid: nevertheless the defendant so being such attorney as aforesaid, but not regarding his duty as such attorney, nor his duty in the premises under and by virtue of his said retainer and employment, but contriving

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and craftily and subtilly intending to injure and annoy the plaintiff, and to cause and procure a great part of the said estate and premises, to wit, the said sixty acres thereof, and the said messuages, buildings, and improvements thereon to be recovered from him by unjust, vexatious, and improper proceedings, heretofore, to wit, on &c., dishonourably, wrongfully, and unjustly, and for the sake of fees and *unjust reward in that behalf, in violation of his duty as such attorney, and contrary to his said duty in the premises, and in violation of good faith, voluntarily and unnecessarily divulged and communicated the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said J. H. Taylor, and then wrongfully, maliciously, dishonourably, and oppressively contriving and intending as aforesaid, instigated and caused and procured divers, to wit, four actions of ejectment respectively on the demise of the said J. H. Taylor to be commenced against divers, to wit, twelve tenants of the now plaintiff, of certain parts of the said estate and premises of the now plaintiff. And the said now plaintiff having as landlord duly appeared and defended the said actions of ejectment, the now defendant prosecuted the same; and also wrongfully, maliciously, unjustly, and oppressively caused and procured a certain other action by and in the name of the said J. H. Taylor against the now plaintiff to be commenced and prosecuted for a certain pretended cause of action, to wit, the cutting down and converting certain timber before then growing on the said estate and premises of the now plaintiff. And the now defendant, further contriving and intending as aforesaid, also then wrongfully and maliciously, unjustly, and oppressively instigated and caused and procured to be commenced and prosecuted, in the name of the said J. H. Taylor, against the now plaintiff, divers, to wit, four other actions for the recovery of certain sums of money claimed to be due from the now plaintiff; which, but for such instigation and causing and procuring of the now defendant, would not have been so commenced or prosecuted. And the now defendant, further contriving as aforesaid, then falsely and maliciously instigated and persuaded, and caused and procured the said J. H. Taylor to commence and prosecute against the now

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*plaintiff a certain untenable suit in the Exchequer for setting aside the conveyance to the now plaintiff of his said estate of and in the said premises, and which was afterwards, to wit, on the 9th of July, 1834, according to equity and justice, dismissed with costs, to be paid by the said J. H. Taylor. And the now plaintiff in order to obtain relief in the premises, was heretofore, in Hilary Term, in the fourth year of our now King, forced and obliged to file, and did file and prosecute his certain bill of complaint against the said J. H. Taylor in the Court of Exchequer for relief in the premises, and in order to obtain an injunction against the prosecution of the said actions of ejectment; and was also then forced and obliged to apply to the said Court of Exchequer for relief against the said now defendant. By means of which said breach of duty, and of the said false, deceptive, fraudulent, and malicious conduct of the now defendant in the premises, the now plaintiff was forced and obliged to incur and did incur great trouble of mind and body, and great expense of his monies, to wit, to the amount of 2,000*l.*, in defending and resisting the said unjust and vexatious proceedings, and in obtaining and enforcing, and in endeavouring to obtain and enforce, by due and lawful ways and means, relief against the same, and other unlawful, oppressive, and unjust proceedings of the now defendant in the premises. And by means and in consequence of the said J. H. Taylor having become and being insolvent and unable to pay the costs of the said vexatious proceedings, so instigated and caused and procured by the now defendant to be instituted and prosecuted in his name as aforesaid, the now plaintiff was unable to recover or obtain payment or satisfaction of or from the said J. H. Taylor of the said costs, and he was wholly unable to pay or satisfy the same; and the now plaintiff was by means of the said malicious, unjust, vexatious, and improper conduct of *the now defendant greatly harassed, oppressed, vexed, and impoverished, and otherwise greatly injured: and also by means of the premises the now plaintiff was hindered and prevented from raising and procuring the said money or other money on mortgage of the said estate and premises for a long time, to wit, from thence until the 20th of January, 1836, and was then by reason of the premises forced

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and obliged to raise and procure on mortgage and security of the said estate and premises a much larger sum of money than the said sum of 4,000*l.*, to wit, the sum of 6,000*l.*, and at a greater rate of interest than at and after such rate of 4 per cent. per annum, to wit, after the rate of 4*l.* 10*s.* per cent. per annum for each and every 100*l.* thereof: to the damage of the now plaintiff of 2,000*l.*

Plea. That before and at the time when the defendant represented to the plaintiff that the defendant had a client who would advance the said sum of 4,000*l.* on sufficient security and at interest, and before and at the time when the plaintiff delivered to the defendant the said abstracts and other documents relating to the said estate and premises, and before and at the time when the defendant discovered and ascertained that there was a certain defect in and objection to the legal right and title of the plaintiff to the said estate and premises, and before and at the time when the defendant divulged and communicated the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to J. H. Taylor, the defendant was the attorney and solicitor of and for the said J. H. Taylor, and had been and was retained and employed by him as such attorney and solicitor generally and in relation to his affairs; whereof the plaintiff had notice; and thereupon it became and was the duty of the defendant, as such attorney and solicitor of and for the said J. H. Taylor, *to divulge and communicate the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said J. H. Taylor, and he did on that account, and without malice or any violation of good faith at the said time, when, &c. divulge and communicate the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises to the said J. H. Taylor, with a view and in order that he might claim and recover the said estate and premises from the plaintiff, if lawfully entitled thereto, as he then appeared and was believed by the defendant to be; and that thereupon the said J. H. Taylor did then retain and employ the defendant as such attorney, to take due and proper proceedings to try and investigate the said right and claim of the said J. H. Taylor, and to recover the said estate and premises for him, and to bring and prosecute the said actions and suits in the

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declaration mentioned respectively: whereupon the defendant did as such attorney, and under the said retainer and without malice to the plaintiff, advise the said J. H. Taylor to bring and prosecute, and the defendant as such attorney under the said retainer, did bring and prosecute the said several actions and suits in the declaration mentioned in that behalf: and that, the defendant was ready to verify.

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Demurrer; for that although the defendant in and by his plea confessed and admitted that he was retained and employed by the plaintiff to act for him as his attorney in the premises, and that under and by virtue of that retainer and employment the defendant discovered and ascertained the said defect in and objection to the legal right and title of the plaintiff to the said estate and premises, but that in justice and equity the beneficial interest in the whole of the said estate and premises then belonged to the *plaintiff,—and although the defendant had in and by his said plea confessed and admitted that it was his duty, under and by virtue of the said retainer and employment, not voluntarily or unnecessarily to divulge or communicate the said defect and objection to the said J. H. Taylor, or to any other person, nor to instigate or cause or procure any action or proceeding for the recovery of the said estate or any part thereof,—yet the defendant had attempted to defend and justify his said illegal conduct upon and under colour of a wholly untenable ground and pretence; and also, for that although the said plea was pleaded in bar to the whole declaration, yet the said plea did not state or shew any defence, or legal or sufficient justification in excuse of or for the said statement and cause of action against the defendant, for or in respect of his having so wrongfully, maliciously, and dishonourably instigated and caused and procured the said actions of ejectment to be commenced and prosecuted, and the said other action to be commenced and prosecuted, for the said pretended cause of action, to wit, the cutting down and converting the said timber, or of or for the defendant having so wrongfully and maliciously, unjustly, and oppressively, instigated, and caused, and procured to be commenced and prosecuted, in the name of the said J. H. Taylor, against the plaintiff the said other actions, and having

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TAYLOR falsely and maliciously instigated and persuaded, and caused
 BLACKLOW.^{r.} and procured the said J. H. Taylor to commence and prosecute
 against the plaintiff the said untenable suit in the Exchequer.

Kelly, for the plaintiff :

[*243] This action lies against the defendant, for he has been guilty of a breach of duty, attended with pecuniary loss to his client. It was as much his duty to conduct the business of the mortgage *with fidelity as to conduct an action with skill. In Com. Dig. Action on the case for deceit, A 5, it is laid down that an action on the case for a deceit, lies, “if a man, being intrusted in his profession, deceive him who intrusted him ; or, if a man retained of counsel become afterward of counsel with the other party in the same cause, or discover the evidence or secrets of the cause. So, if an attorney act deceptive to the prejudice of his client ; as if by collusion with the demandant he make default in a real action, whereby the land is lost.” Lord LYNDEHURST, upon the investigation of the present case in the Court of Chancery, described the defendant’s conduct as a breach of professional duty ; and the delay occasioned to the plaintiff in obtaining his money was a special damage, which is as much the subject of an action as special damage occasioned by words not otherwise actionable. In *Cholmondeley v. Clinton* (1) an attorney was restrained, under circumstances similar to the present, from acting for the opposite party.

Jervis, contra :

The circumstances stated in the declaration do not disclose a legal duty for the breach of which an action lies. The disclosures made by the defendant he would not, in his character of attorney, have been privileged to withhold in a court of justice. The privilege of withholding communications made by a party to a witness is the privilege of the client, and is confined to what passes between the client and his attorney, in the capacity of attorney. In *Wilson v. Rastall* (2) it was laid down that the privilege is confined to counsel, solicitors, and attornies, when acting in their respective characters : BULLER, J. saying, “ The

(1) 13 R. R. 183 (19 Ves. 261).

(2) 2 R. R. 515 (4 T. R. 753).

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nature of this kind of privilege is, that the attorney shall not be permitted to disclose, in any action, that which has been *confidentially communicated to him." So in *Cobden v. Kendrick* (1) it was held, that an attorney was not restrained, by any rule of law, from giving evidence of a conversation between him and his client, touching the justice of his suit, after a writ of inquiry executed on an interlocutory judgment, and a compromise thereupon; for the purpose of the suit having been obtained, the communication could not be said to have been made, by way of instruction, for conducting his cause: and in Buller's N. P. 284 it is laid down, that to this privilege "there are some exceptions; first, as to what such persons knew before the retainer; for, as to such matters, they are clearly in the same situation as any other person; secondly, to a fact of his own knowledge, and of which he might have had knowledge, without being counsel or attorney in the cause; as suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution." In *Walker v. Wildman* (2) it was held, that the privilege of solicitor and client extended to all communications for professional advice, but not to employment in matters not professional; and in *Bramwell v. Lucas* (3), ABBOTT, J. says, "Whether the privilege extends to all confidential communications between attorney and client or not, there is no doubt that it is confined to communications, and to communications to the attorney in his character of attorney. A question for legal advice may come within the description of a confidential communication, because it is part of the attorney's duty, as attorney, to give legal advice; but a question for information as to matter of fact, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney, *and where the character or office of attorney has not been called into action, has never been held within the protection and is not within the principle upon which the privilege is founded." In *Moore v. Terrell* (4) the Court forbore to decide whether communications touching a mortgage were confidential or not.

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(1) 2 R. R. 424 (4 T. R. 431).

(3) 2 B. & C. 745.

(2) 22 R. R. 234 (6 Madd. 47).

(4) 4 B. & Ad. 870.

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Cholmondeley v. Clinton only shews that an attorney is not permitted voluntarily to enter into the interest of his client's opponent; but he may do so if dismissed, which would not be permitted if the duty of secrecy were such as is assumed in this declaration. In *Robinson v. Mullett* (1), it was held, that a solicitor who had acted to a certain extent only for parties, defendants in an amicable suit in Chancery, would not be restrained from acting in a cause by bill filed by some of those defendants, on behalf of themselves, against others of them, the solicitor making affidavit, that he was not confidentially possessed of any secrets which might be used to the prejudice of such other defendants, or had knowledge of any facts unknown to his clients. In *Beer v. Ward* (2), the Court, on motion to restrain a solicitor from giving evidence of confidential matters, refused to interfere: the propriety of his being examined being left to the consideration of the Court before which he might appear as a witness. In *Bricheno v. Thorp* (3) the LORD CHANCELLOR qualified the rule laid down in *Cholmondeley v. Clinton*. In *Grissell v. Peto* (4), where the Court refused to restrain the defendant's attorneys from acting in the cause, on the ground that they had obtained a knowledge of the plaintiff's case in the course of a Chancery suit in which they had been acting in conjunction with the plaintiff, and in which the defendant had no interest, the defendant's attorneys deposing. *that, in that suit, they acted also for the defendant, the Court did not advert to the legal liability of the attorney. So in *Roberson v. Marriott* (5), where an attorney had been employed in a cause, and was afterwards discharged by his client, not on the ground of misconduct, the Court would not restrain him from acting for the opposite party, unless it clearly and distinctly appeared that he had obtained information in his former character which it would be prejudicial to the cause of his former client to communicate. It may be conceded, however, that there are cases in which the Courts may interfere to restrain an attorney from acting, or may punish him for improper communications: *Bolton*

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(1) 18 R. R. 723 (4 Price, 353).

(2) 23 R. R. 3 (Jacob, 77).

(3) 23 R. R. 69 (Jacob, 300).

(4) 9 Bing. 1.

(5) 2 Cr. & M. 183.

v. Corporation of Liverpool (1). But the power of the Court to punish does not necessarily imply a legal liability to the client. Here, the defendant was attorney for the mortgagee, as well as for the mortgagor: the mortgagor, being aware of that circumstance, must have anticipated that there would be no concealment of his affairs; and under such circumstances the Court cannot draw the line between the conflicting duties which the defendant was called on to discharge.

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Kelly, in reply :

The disclosure complained of in the declaration was not one which the defendant could have been compelled to make in the character of a witness; but if it were otherwise that would not be an answer to this action; for it might be allowable to disclose that on compulsion which it would be a breach of duty to communicate voluntarily. In *Moore v. Terrell* (2), however, Lord DENMAN inclined to think that a knowledge of a party's title, obtained by an attorney in the course of his employment, would fall within the rule of privileged communications in its narrower sense; and PARKE, J. says * (p. 876), "In *Greenough v. Gaskell* (3) the LORD CHANCELLOR consulted with TINDAL, Ch. J., Lord LYNDBURST, and myself, and we all thought the client's privilege extended much beyond communications in respect of a suit." But in *Cromack v. Heathcote* (4), where an attorney being requested to draw an assignment of goods refused, and the deed was drawn by another, the validity of the deed being afterwards questioned, on the ground of fraud, in an action against the sheriff, in which the attorney first applied to was not employed, it was held, that the communication made to that attorney was professional, and that evidence of the fraud proposed to be given through him was properly rejected. The cases in equity were all applications to the discretion of the Court, and have no bearing upon the question of liability in respect of a duty.

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TINDAL, Ch. J. :

This case, as it has been argued, depends on the existence of

(1) 36 R. R. 251 (1 Myl. & K. 88).

(3) 36 R. R. 258 (1 Myl. & K. 98).

(2) 4 B. & Ad. 870.

(4) 22 R. R. 638 (2 Brod. & B. 4).

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the right of action as disclosed in the declaration ; and it appears to us that the plaintiff is entitled to maintain his action, notwithstanding the defendant's plea. Cases have been cited and discussed on the part of the defendant, to shew that the disclosures which he has made, are such as if called as a witness he would not have been privileged to withhold. It is not necessary for us to decide that question ; though, if it were, the cases of *Moore v. Terrell* (1) and *Cromack v. Heathcote* (2) go a long way to set it at rest ; it is enough to say that the complaint against the defendant, in the terms of the declaration, is, that dishonourably, wrongfully, and unjustly, and for the sake of fees and unjust reward in that behalf, in violation of his duty as an attorney, contrary to his duty in the premises, and in violation of good faith, he voluntarily and *unnecessarily divulged the defect in the title of the plaintiff : it stands clear therefore of any question with respect to disclosures which the defendant might have been called on to make on compulsion. It is alleged to have been his duty not voluntarily or unnecessarily to divulge the said defect in the plaintiff's title : and it was most clearly his duty not to disclose any defect in his client's title. Instead of faithfully discharging that duty, when his client's deeds are put into his hands for the purpose of raising money he discloses defects of title to the very person who was about to lend. It is argued that he was also employed on the part of the proposed lender, and was actuated by a sense of justice towards him. There may be persons also who have not sufficient firmness to take a decided course under such circumstances ; but if the defendant thought he had a conflicting duty towards his several employers, it would have been an easy course to deliver back the deeds to the plaintiff, and to consider his lips sealed with a sacred silence as to the whole of their contents : however, he thought proper to disclose the defects in his client's title to one who thereupon brought actions and filed bills in Chancery against the plaintiff. In consequence of this disclosure, the plaintiff sustained the temporal injury of the costs and expenses of those suits. There has been therefore a breach of duty on the part of the defendant, attended with temporal injury on the

(1) 4 B. & Ad. 870.

(2) 22 R. R. 638 (2 Brod. & B. 4).

part of the plaintiff, and there is no ground for saying that an action does not lie for such an injury, incurred by a breach of duty. If there were any doubt, an answer would be found in the authority cited from Comyns's Digest. It is urged that the plaintiff was himself aware that the defendant was employed also by the party to whom he made the disclosures. I cannot see how that circumstance affords an answer to this action, unless it be considered in the light of a waiver; *but as the plaintiff could never have expected that defects in his title should be disclosed by his own attorney, his knowledge of the defendant's intercourse with the other party cannot be taken to operate as a waiver.

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GASELEE, J. :

It is not important to the decision of this cause, whether the communication which the defendant made was one which he would have been authorised to withhold in a witness-box or not; for the first duty of an attorney is to keep the secrets of his client. Authority is not wanted to establish that proposition; but, if it were, the passage cited from Comyns's Digest is sufficient.

VAUGHAN, J. :

I am of the same opinion. There can be no doubt the defendant has been guilty of a gross breach of a great moral duty; and the law is never better employed than in enforcing the observance of moral duties. I think, however, that the contents of these deeds were a privileged communication, which the defendant could not have been compelled to disclose. The law has been laid down too narrowly on that head by the counsel for the defendant.

BOSANQUET, J. :

I forbear to express any opinion on the question whether the particulars of the plaintiff's title were or were not a privileged communication, because the decision of that question is not necessary to the determination of this case; but when the defendant was employed to raise money, it was his

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Judgment for plaintiff.

IN THE EXCHEQUER CHAMBER.

ROUX v. SALVADOR (1).

1836.
Nov. 15.
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(3 Bing. N. C. 266—290; S. C. 4 Scott, 1; 2 Hodges, 209; 7 L. J. (N. S.) Ex. 328.)

Hides insured from Valparaiso to Bordeaux free of particular average, unless the ship were stranded, arriving at Rio de Janeiro on their way to Bordeaux, in a state of incipient putridity, occasioned by a leak in the ship, were sold for a fourth of their value at Rió, because, by the process of putrefaction, they would have been destroyed before they could have arrived at Bordeaux. The assured received the news of the damage to the hides and of their sale, at the same time: Held, that the assured might recover as for a total loss, without abandonment.

ASSUMPSIT on a policy of assurance, subscribed by the defendant for 200*l.* Plea, *non assumpsit*.

By a special verdict it was found, in substance, that

The policy on which the action was brought was effected on goods per the *General La Fayette*, and other ship or ships, at and from, among other ports or places in the Pacific Ocean, Valparaiso, to any port or ports in France and the United Kingdom of Great Britain, with leave to touch and trade at any place in America or any where else; to effect all transshipments; and including *the risk of craft to and from the vessel or vessels. The usual perils were insured against; and the policy, which was for 700*l.*, had the following memorandum subscribed: "N. B. Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under

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(1) This case has been frequently cited and followed. Among the more recent cases are the following: *Cosman v. West* (P. C. 1887) 13 App. Cns. 160, 57 L. J. P. C. 17; *Buchanan & Co. v. London and*

Provincial Marine Ins. Co. (1895) 65 L. J. Q. B. 92; *Asfar v. Blundell*, '96, 1 Q. B. 123, 65 L. J. Q. B. 138, 73 L. T. 648, C. A.; *Francis v. Boulton* (1895) 65 L. J. Q. B. 153, 73 L. T. 578.—R. C.

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5 per cent.; and all other goods; also the ship and freight are warranted free from average under 3 per cent., unless general, or the ship be stranded." The policy was declared to be on goods, specie, or bullion, as interest might appear: to pay average on each species of goods by following landing numbers of the value of 100*l.* each, as if separately insured. Cocoa and hides, free of particular average, unless the ship were stranded: in case of average on the hides, the assurers were to pay the expense of washing and drying in full.

Under this policy the plaintiff, on the 6th of May, 1831, caused to be shipped on board the ship *Roxalane*, at Valparaiso, for Bordeaux, in France, 1,000 salted hides, of the value of 1,117*l.*, his property, which hides were intended to be insured by the said policy, and were duly declared thereupon, and a bill of lading duly signed by the captain in the ordinary form.

On the 13th of May, 1831, the said ship being seaworthy, with the said 1,000 hides, and other hides on board thereof, set sail from Valparaiso aforesaid, on her said voyage towards Bordeaux. On the 5th of June, 1831, in the course of her said voyage, the said ship, with the said goods on board thereof, encountered bad weather and sprung a leak, and it thereby became necessary, for the safety of the ship and cargo, that the said ship should put into a port for repair, and the said ship did accordingly put into Rio de Janeiro, in Brazil, being the nearest port, for repair. On the 7th of July, *1831, the whole of her cargo was there landed; and it was then found, that the said hides were damaged by the said perils and dangers of the seas, as follows; that is to say, that they had been washed or wetted by the seawater which had entered into the vessel through the said leak, and also by the effect of the dampness produced in the hold by the leak, and in consequence thereof a partial fermentation ensued. the progress of which could not be stopped by any means practicable in Rio de Janeiro; and, in consequence of the progressive putrefaction of the said 1,000 hides, it was impossible to carry them, or any part thereof, in a saleable state to the termination of the voyage for which they were insured: if it had been attempted to take them to Bordeaux, they would, by reason of such progressive putrefaction as aforesaid, have altogether

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have lost the character of hides before they arrived there. On the 27th of August, 1831, at Rio de Janeiro, the said 1,000 hides in the said policy mentioned, according to the ordinances of the French consul-general there, were sold, by public auction, for the gross sum of 273*l.*: the same were bought by the purchasers for the purpose of being tanned, and were tanned accordingly. The ship *Roxalane* being repaired, and the leak stopped which was in her bottom, she, on the 3rd of October, 1831, sailed from Rio de Janeiro without the said hides in the said policy mentioned, but with such part of her cargo reloaded on board as had not been sold; and in the course of her voyage from Rio de Janeiro to Bordeaux, was stranded at the entrance of the river Garonne, on the 29th of December, 1831. The earliest intelligence of the damage, and of the sale of the said 1,000 hides, was received at the same time by Messrs. Devaux & Company, the agents for the said plaintiff, by a letter from Bordeaux.

[*269] The Court of Common Pleas, after two arguments *having given judgment for the defendant (1), the cause was removed by error into the Exchequer Chamber, where it was argued in Easter Vacation, 1836, by *Maule* for the plaintiff, and the *Attorney-General* for the defendant.

[After argument, the Court took time for consideration.]

[275] LORD ABINGER, C. B. :

This was a writ of error upon a judgment of the Court of Common Pleas, in an action on a policy of insurance upon goods by the *Roxalane* at and from any ports or places in South America, to a port in France or the United Kingdom, with various liberties, not material to be mentioned. By a written memorandum at the foot of the policy, the insurance was declared to be on hides shipped at Valparaiso free of average, unless the ship should be stranded; and, in case of average loss, the underwriters were to pay the expense of washing and drying in full. The declaration contains the usual averments, and states that the hides were shipped at Valparaiso; that the vessel set sail with them on board for Bordeaux, a port in France;

(1) See 1 Bing. N. C. 526.

and that in the course of the voyage, the hides became lost by the perils of the sea, and never arrived at Bordeaux.

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The plea is the general issue.

It appears by the record that the cause was tried, and a special verdict found, which after stating the facts necessary to support those parts of the declaration upon which no question arises, sets forth the loss, in substance as follows: That the hides of the value of 1,000*l.* having been shipped in the vessel, she set sail on her *voyage; in the progress of which she encountered perils of the sea, and sprung a leak, in consequence of which she was compelled to put into Rio Janeiro, being the nearest port; that her cargo was taken out and landed, when it was found, as the fact was, that the hides were damaged by the perils of the sea; that by reason of their being wetted by the water issuing through the leak, and of the consequent dampness of the hold, they were undergoing a process of fermentation, which could not be checked; and that in consequence of their progressive putrefaction it was impossible to carry them, or any part of them, in a saleable state, to the termination of the voyage; and that if it had been attempted to take them to Bordeaux they would in consequence of the putrefaction have lost the character of hides before their arrival. The special verdict further states, that the hides were in consequence sold at Rio Janeiro by order of the French consul there, for the sum of 270*l.*; that they were purchased to be tanned, and were afterwards tanned; that the ship being repaired, set sail for Bordeaux, and was stranded upon entering the Garonne; and that the earliest intelligence of the damage and sale were received at the same time in a letter from Bordeaux.

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The judgment is entered for the defendant: to set aside which judgment this writ of error is brought. The stranding of the vessel upon entering the river Garonne in her passage to Bordeaux, is introduced into the special verdict, with a view to meet the supposed case of a partial loss: and it has been contended, that the fact of stranding, being a condition to let in the claim for a partial loss, it is not material whether the stranding takes place whilst the goods insured are on board, or after they have been landed. We are not prepared to adopt that conclusion:

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but the view we take of this case renders it unnecessary to enter into any discussion of the *argument, or to pronounce any opinion upon it. It appears from the report of the judgment of the Court of Common Pleas upon this case (1), that the learned Judges were of opinion that there was a constructive total loss, in case it had been followed by an abandonment to the underwriters ; and that their judgment for the defendant was grounded upon the want of such abandonment.

It has been urged before us in support of the judgment, first, that there was no total loss ; secondly, that if there were any circumstances which might have amounted to more than an average or partial loss, they were not such as without an abandonment could have been converted into a total loss. Upon the first point it has been contended, that even if these goods had not been excepted from average loss by the memorandum, unless upon the condition of stranding, there would not in this case have been a total loss, and that, *à fortiori*, being goods so expressly excepted from average loss by the memorandum, they could not become totally lost so long as any part of them remained in specie at the termination of the risk ; that the risk terminated when the goods were taken out at Rio de Janeiro, when they were so far from being destroyed by the perils of the sea, that they were actually sold as hides, and were capable of being tanned.

It appears to us that there is no ground whatever for this assumed distinction between goods that are subject to a partial loss unconditionally, and goods excepted by the memorandum from such a loss. The interest which the assured may have in certain cases to convert a partial loss into a total loss, may be a fair argument to a jury upon a doubtful question of fact as to the nature of the loss or the motive for an abandonment ; and, in the same view that interest has been adverted to occasionally by Judges, where the conclusions to be drawn *from facts upon a special case, or upon a motion for a new trial, were open to discussion. But there is neither authority nor principle for the distinction in point of law ; whether a loss be total or partial in its nature, must depend upon general principles. The memorandum does not vary the rules upon which a loss shall be

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(1) 1 Bing. N. C. 526.

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partial or total; it does no more than preclude the indemnity for an ascertained partial loss, except on certain conditions. It has no application whatever to a total loss, or to the principle on which a total loss is to be ascertained.

Dismissing this distinction then, the argument rests upon the position, that if, at the termination of the risk, the goods remain in specie, however damaged, there is not a total loss. Now this position may be just, if by the "termination of the risk," is meant the arrival of the goods at their place of destination according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea. The object of the policy is to obtain an indemnity for any loss that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination. If, by reason of the perils insured against, the goods do not so arrive, the risk may in one sense be said to have terminated at the moment when the goods are finally separated from the vessel: whether, upon such an event, the loss is total or partial, no doubt, depends upon circumstances. But the existence of the goods, or any part of them, in specie, is neither a conclusive, nor, in many cases, a material circumstance to that question. If the goods are of an imperishable nature, if the assured become possessed or can have the control of them, if they have still an opportunity of sending them to their destination, the mere retardation of their arrival at their original port may be of no prejudice *to them beyond the expense of re-shipment in another vessel. In such a case, the loss can be but a partial loss, and must be so deemed, even though the assured should, for some real or supposed advantage to themselves, elect to sell the goods where they have been landed, instead of taking measures to transmit them to their original destination. But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are, by reason of that damage, in such a state, though the species be not utterly destroyed, that they cannot with safety be re-shipped into the same or any other vessel; if it be certain that, before the termination of the original voyage, the species itself would disappear, and the goods assume a new form, losing

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all their original character ; if, though imperishable, they are in the hands of strangers not under the control of the assured ; if by any circumstance over which he has no control they can never, or within no assignable period, be brought to their original destination ; in any of these cases, the circumstance of their existing in specie at that forced termination of the risk, is of no importance. The loss is, in its nature, total to him who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle. Accordingly, in the case of *Hunt and others v. The Royal Exchange Assurance* (1), which was cited by the *Attorney-General* in support of his argument, the judgment of Lord ELLENBOROUGH contains a very important passage, which distinguishes it from the present case. He says, “ If, indeed, the cargo had been of a perishable nature, this would not have been a case of retardation only, but of destruction of the thing assured ; ” and further, he says, “ I cannot necessarily infer that the flour would be changed in quality *and condition by the delay from November to April, so as to incur any material damage operating a destruction of the thing insured.” In the case of *Anderson v. Wallis* (2), which was also relied upon, the goods consisted of copper, which was wholly uninjured, and of iron, which was partially damaged ; the assured by their own agent had possession of them ; the ship was capable of repair, and might have prosecuted the voyage, and did, in four weeks after the accident, sail upon another voyage : the only pretence for a total loss was the retardation of the voyage ; upon which ground, combined with the other circumstances, the Court held the loss not to be total. But it is clear from the judgment of the Court, that if, by reason of the perils of the sea, the goods could never have been sent to their destination, the loss would have been held to be total. In like manner it will be found in the other cases cited upon this part of the argument, that there has always existed one or more other circumstances in combination with that of the goods existing in specie, to induce the judgment that the loss was not total : as in *Glennie v. The London Assurance Co.* (3), the

(1) 17 R. R. 264 (5 M. & S. 47).

(3) 15 R. R. 275 (2 M. & S. 371).

(2) 14 R. R. 642 (2 M. & S. 240).

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rice had arrived at his port of destination, and though damaged, was delivered to the consignees, and in a saleable state as rice. In *Thompson v. The Royal Exchange* (1), the tobacco and sugar, though damaged by the perils of the sea, were in the hands of the owner at Heligoland; and as stated by Lord ELLENBOROUGH, in his judgment, might for any thing that appeared have been forwarded to their port of destination. In *Anderson v. The Royal Exchange Assurance Company* (2), the wheat was partly saved, was in the hands of the shipper at Waterford, was kiln-dried, and might have been forwarded as the rest of the cargo *was, after the same operation, to its port of destination: but the owner, after dealing with it for some time as his own, abandoned it too late, even if he ever had a right to abandon it at all. In the case before us the jury have found that the hides were so far damaged by a peril of the sea, that they never could have arrived in the form of hides. By the process of fermentation and putrefaction, which had commenced, a total destruction of them before their arrival at the port of destination, became as inevitable as if they had been cast into the sea or consumed by fire. Their destruction not being consummated at the time they were taken out of the vessel, they became in that state a salvage for the benefit of the party who was to sustain the loss, and were accordingly sold; and the facts of the loss and the sale were made known at the same time to the assured. Neither he nor the underwriters could at that time exercise any control over them, or by any interference alter the consequences. It appears to us, therefore, that this was not the case of what has been called a constructive loss, but of an absolute total loss of the goods: they could never arrive; and, at the same moment when the intelligence of the loss arrived, all speculation was at an end. It has indeed been strenuously contended before us, that the sale of the hides whilst they remained in specie, rendered abandonment necessary to make the loss total; that the money produced at the sale became vested in the assured; that he had an undoubted right to keep it if he thought proper, and to treat the loss as partial; and that, wherever it is in his power to treat the loss as partial,

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(1) 16 East, 214.

(2) 8 R. R. 589 (7 East, 38).

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an abandonment is necessary to make it a total loss. The assured certainly has always an option to claim or not; but his abstaining from his right does not alter the nature of it: and if it be true that the proceeds of the sale vested in him, they would equally have done so, if, instead of *being sold in specie, the hides had actually changed their form, and been sold as glue, or manure, or ashes. The argument, therefore, in effect, resolves itself into this question, whether, when a total loss has taken place before the termination of the risk insured, with a salvage of some portion of the subject insured, which has been converted into money, the insured is bound to abandon before he can recover for a total loss. If any doubt should exist upon this point, it is important that it should be well considered and determined.

The history of our own law furnishes few, if any, illustrations of the subject of abandonment before the time of Lord Mansfield. That great Judge was obliged to resort to the aid of foreign codes, and to the opinions of foreign jurists, for the rules and principles which he laid down in the leading cases of *Goss v. Withers* (1), and *Hamilton v. Mendez* (2). But even those principles are, comparatively speaking, of modern date. The most ancient codes of the law maritime when it was considered as part of the law of nations, contain no chapter upon assurances, neither do the earliest municipal codes, nor the earliest treatises upon assurances make any mention of abandonment. When a policy of assurance was considered in the nature of a wager without reference to any actual interest possessed by the assured, it was needless to treat of abandonment. The code of Florence, which bears date 1523, contains no allusion to that topic. The decisions of the rota of Genoa, at the time when that state was most eminent for its naval power and commercial enterprise, have been preserved by Straccha. Amongst them are found many cases of insurance upon sea risks: not one of them turns upon any question of abandonment, or contains any allusion to that subject. The same author has written a *very elaborate treatise upon assurances, but is equally silent on the subject of abandonment. He has also preserved in that

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(1) 2 Burr. 683.

(2) 1 W. Bl. 276.

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treatise the form of a policy, bearing date at Ancona, October 20, 1567, which he says was at the time in general use amongst the states of Italy. From the terms of that policy it is difficult to infer any right or duty of abandonment. It contains this clause, "Et si delle mercantie assecurate intervenisse o fosse intervenuto alcun disastro li assecuratorij debbono dare et pagare quelli danari assecurati al detto assecurato fra mesi due dal di che in Ancona ne fosse vera nuova (1). Et si pretendessero per ragione alcuna dire in contrario non possono esser uditi da corte, giudice, o magistrato alcuno, si prima non averanno pagati effectualmente danari contanti." So that not only two months after the credible news of any disaster was the underwriter bound to pay a total loss, but if he meant to contest the claim, he was within that time to purchase the right of litigation by first paying the sum insured. It was, however, to be restored to him in the event of his success. There is also a clause in the policy, by which if there was no account of the ship for twelve months, the underwriter was bound to pay at the end of that time, subject to restitution if the ship should afterwards arrive: a provision wholly inconsistent with any notion of abandonment. The same law probably prevailed at that period throughout the states of Italy. But when assurances came to be considered as contracts of indemnity, and not as mere wagers, it became necessary to make some rules for the conduct of the parties, where the loss was partial, as well as to secure to the assured, when it was total, the full measure of his indemnity, and no more. The obligation of abandonment was the necessary consequence of confining the object of the contract to a strict indemnity. Accordingly we find in the chapter of assurances in the civil statutes of Genoa in 1610, the disaster *upon which the underwriter is bound to pay, is limited and defined to be the incapacity of the ship to proceed within a month after she has been disabled, or the detention of her by force, and the compulsory dereliction of her voyage, whereby she is forced to land the goods insured. In those cases the assured may either abandon

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(1) "Nueva" in the original report, seemingly by a printer's error, as such a form is not Italian.—F. P.

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the goods and demand the full insurance, or make up the amount of the loss, and demand it from the underwriters, who, if it amount to 50 per cent., shall have their option, either to pay that sum and leave the goods to the assured, or to pay the whole and take the goods. By the same law wager policies are prohibited and declared void.

Here, it is obvious, that the object of the law was to limit the claim of the assured to a strict indemnity. The same principle will be found in the various codes of the other maritime states of Europe in which abandonment is mentioned; though it must be admitted that the rules they have respectively adopted are very different. In some, abandonment is merely permissive, and limited to very few cases. In others, as in the codes of Rotterdam and Amsterdam, abandonment was imperative even in the case of an absolute total loss. Such seems to have been the law of France as established by the ordinances of Louis XIV. in 1681. From the words of that code, indeed, it might be thought that they were only intended to prohibit it in all but the specified cases, and not to enforce it as a preliminary condition for recovering an absolute total loss: “ne pourra le délaissement être fait qu’en cas de prise, naufrage, bris, échouement, arrêt de prince, ou perte entière des effets assurés: et tous autre dommages ne seront réputés qu’avaries.” Emerigon, in his *Treatise des Assurances*, c. 17, s. 1, remarks, that abandonment presents to the mind the idea of a thing existing in whole or in part, or at least the idea of a doubtful existence, *for it appears absurd to renounce to the assurers a thing of which the absolute loss is already established. Nevertheless, he says, “according to our maritime laws one may abandon to the underwriters a thing entirely lost, and however singular it may appear, the law requires the form of an abandonment in the process of an action *de délaissement*, though it be stated that the goods have absolutely ceased to exist.” This apparent inconsistency in the law of France is now removed by the *Code Napoléon*. Under the title *du Délaissement* in the *Code de Commerce*, there are seven cases enumerated, in which abandonment is permitted, amongst which the “perte entière des effets assurés” is not to be found. There is, indeed, a power given to abandon in case the loss or

damage of the goods insured amounts to three-fourths ; but the necessity of making an abandonment in case of the entire loss, seems to be guarded against expressly by the Article 372, which provides, “ that the abandonment shall extend to nothing but those effects which are the objects of the assurance and of the risk.”

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But whatever lights might have been heretofore derived from foreign codes and jurists, the practice of insurance in England has been so extensive, and the questions arising upon every branch of it have been so thoroughly considered and settled, that we need not now look beyond the authorities of the English law to illustrate the principle on which the doctrine of abandonment rests, and the consequences which result from it. It is, indeed, satisfactory to know, that however the laws of foreign states upon this subject may vary from each other, or from our own, they are all directed to the common object of making the contract of insurance a contract of indemnity, and nothing more. Upon that principle is founded the whole doctrine of abandonment in our law. The underwriter engages, that the object *of the assurance shall arrive in safety at its destined termination. If, in the progress of the voyage, it becomes totally destroyed or annihilated, or if it be placed, by reason of the perils against which he insures, in such a position, that it is wholly out of the power of the assured or of the underwriter to procure its arrival, he is bound by the very letter of his contract to pay the sum insured. But there are intermediate cases—there may be a capture, which, though *prima facie* a total loss, may be followed by a recapture, which would revest the property in the assured. There may be a forcible detention which may speedily terminate, or may last so long as to end in the impossibility of bringing the ship or the goods to their destination. There may be some other peril which renders the ship unnavigable, without any reasonable hope of repair, or by which the goods are partly lost, or so damaged, that they are not worth the expense of bringing them, or what remains of them, to their destination. In all these or any similar cases, if a prudent man not insured, would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat

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the case as one of a total loss, and demand the full sum insured. But if he elects to do this, as the thing insured, or a portion of it still exists, and is vested in him, the very principle of the indemnity requires that he should make a cession of all his right to the recovery of it, and that too, within a reasonable time after he receives the intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value; and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value. In all these cases, not only the thing assured or part of it is supposed to exist in specie, but *there is a possibility, however remote, of its arriving at its destination, or at least of its value being in some way affected by the measures that may be adopted for the recovery or preservation of it. If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so; but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss. If, in the event, the loss should become absolute, the underwriter is not the less liable upon his contract, because the insured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before. In the language of Lord ELLENBOROUGH, in the case of *Mellish v. Andrews* (1), “it is an established and familiar rule of insurance, that when the thing insured subsists in specie, and there is a chance of its recovery, there must be an abandonment. A party is not in any case obliged to abandon, neither will the want of an abandonment oust him of his claim for that which is in fact an average or total loss, as the case may be.” Again, in *Mullett v. Shedden* (2), the same learned Judge says, “If, instead of the saltpetre having been taken out of the ship and sold, and the property divested, and the subject-matter lost to the owner, it had remained on board the ship, and been restored at last to the owner, I should have thought there was much in the argument, that, in order to make it a total loss, there should have been notice of abandonment, and that such notice should have been given sooner: but here the property itself was totally

(1) 13 R. R. 351 (15 East, 13).

(2) 12 R. R. 347 (13 East, 304).

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lost to the owner, and the necessity of any abandonment was altogether done away." In that case, the sentence *under which the sale was made had been reversed, and the proceeds directed to be paid to the owner. So that there was a substitution of money for a portion at least of the matter insured. Both these cases are direct authorities that no abandonment is necessary where there is a total loss of the subject-matter insured. To which may be added the cases of *Green v. The Royal Exchange Assurance Company* (1), *Idle v. The Royal Exchange Assurance Company* (2), *Robertson v. Clarke* (3), *Cambridge v. Anderton* (4): this last is in all points similar to the present, and is an express decision that, when the subject-matter insured has, by a peril of the sea, lost its form and species, where a ship, for example, has become a wreck or a mere congeries of planks, and has been *bonâ fide* sold in that state for a sum of money, the assured may recover a total loss without any abandonment. In fact, when such a sale takes place, and in the opinion of the jury is justified by necessity and a due regard to the interests of all parties, it is made for the benefit of the party who is to sustain the loss; and if there be an insurance, the net amount of the sale, after deducting the charges, becomes money had and received to the use of the underwriter, upon the payment by him of the total loss. It may be proper to mention, however, that the assured may preclude himself from recovering a total loss, if, by any view to his own interest, he voluntarily does, or permits to be done, any act whereby the interests of the underwriter may be prejudiced in the recovery of that money. Suppose, for example, that the money received upon the sale should be greater than or equal to the sum insured, if the assured allows it to remain in the hands of his agent, or of the party making the sale, and treats it as his own, he must take upon himself the consequence of any subsequent *loss that may arise of that money, and cannot throw upon the underwriter a peril of that nature. This is the true principle of the case of *Mitchell v. Edie* (5), which was cited as an authority for the decision of the Court of Common Pleas.

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(1) 16 R. R. 571 (6 Taunt. 68).

(2) 21 R. R. 538 (8 Taunt. 755).

(3) 25 R. R. 676 (1 Bing. 445).

(4) 26 R. R. 517 (2 B. & C. 691).

(5) 1 R. R. 318 (1 T. R. 608).

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There the insurance was upon sugar from Jamaica to London. The ship had been captured by a privateer, deprived of some of her crew and a portion of her stores, then released, and carried by the remainder of the crew into Charleston, where she arrived on the 18th of February, 1782. The report does not state when the intelligence of this event arrived in London, but it is probable that it must have reached the assured before the month of June following. One of the owners of the ship was resident at Charleston; he took possession of her, and, instead of dispatching her on the original voyage, he sold the cargo of sugar in the month of June, and sent the ship on another voyage. He had been connected with the assured in former adventures. He retained the money in his hands, and came to England in June, 1783. The assured pressed him for payment of the money, but took no step to recover it; he became insolvent the following year: no claim was made upon the underwriters till after this event; and then, after the expiration of three years from the alleged loss of the goods, notice of abandonment was given, and the action brought; upon which the defendant paid into Court a sum sufficient to cover a general average, and pleaded the general issue. The Court gave judgment against the plaintiff; stating that he had abandoned too late. And it cannot be disputed, that if he ever had any colour for claiming a total loss, it must have been upon an abandonment before he heard of the sale, as he afterwards gave credit to his agent for the money, *and elected to treat it as his own, till the event of an insolvency, which prevented the underwriter from recovering it. But in fact there never was a total loss by a peril of the sea. The sugars were safe at Charleston, and the sale by the owner of the ship, was not a loss by a peril ensured against. The secret of the conduct of the assured may be discovered by a reference to the dates and the circumstances of the time. During the war with America, and especially towards the close of it, the intercourse between that country and the West India Islands was much interrupted, and the price of colonial produce was higher in Charleston than in London. It was therefore probably his interest to give up his claim upon the underwriters, and adopt the sale. If therefore the sale of the goods could have

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been treated as a loss, the conduct of the assured had either deprived him of the right to claim it, or made him liable, if he had the right, to account to the underwriters for the amount of the sale. If indeed the Court must be supposed to have treated the sale at Charleston as a loss, for which the underwriter was at any time responsible, the case may be an authority for establishing the principle, that even when a total loss has occurred, by a sale of the goods, the assured may, by his own conduct in electing to take the proceeds instead of making his claim upon the underwriter, if he thereby alters the position of the facts so as to affect the interest of the underwriter, forfeit his claim to recover a total loss. But the case is in no view an authority for the judgment of the Court of Common Pleas, which for these reasons we think ought to be reversed; and a verdict entered for the plaintiff for 27*l.* 15*s.* 6*d.* and 40*s.* costs.

Judgment for plaintiff.

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(3 Bing. N. C. 311—326; S. C. 3 Scott, 681; 2 Hodges, 255; 6 L. J. (N. S.) C. P. 55.)

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A lease, by a vicar, of messuages in the city of London, of which the dwelling-house used for the habitation of the vicar, formed no part, and the ground demised was less than ten acres, for twenty-one years from the date of the lease, made at a time when a former lease of the same premises, for forty years, was in being, but within three years of its expiration; Held, not void under either of the restraining Acts of Elizabeth.

THE following case was submitted by the VICE-CHANCELLOR for the opinion of this Court.

The vicarage of the parish, and parish church of St. Giles Without, Cripplegate, is a benefice with cure of souls in the city of London; and the several messuages or tenements hereinafter particularly mentioned (not being the capital messuage or dwelling-house used for the habitation of the vicar, nor having ground to the same belonging above the quantity of ten acres), are parcel of the possessions of the said vicarage, and are situate and being within the said city, and have been accustomed to be demised by the vicars of the said parish, for the time

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being, for the term of forty years in possession, at the yearly rent of 3*l*.

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By indenture of lease, bearing date the 30th of October, 1793, and made between the Rev. George Watson Hand, since deceased, then vicar of the parish church of St. Giles Without, Cripplegate, aforesaid, of the one part, *and Thomas Smith and others of the other part, for the consideration therein expressed, the said G. W. Hand did demise unto the said other persons, parties thereto, the messuages or tenements, and other hereditaments hereinafter particularly mentioned, parcel of or belonging to the vicarage of St. Giles Without, Cripplegate, as aforesaid, with the appurtenances; To hold the same unto the aforesaid lessees, their executors, administrators, and assigns, from the 29th of September then last past, for the term of forty years; yielding and paying, therefore, yearly during the said term unto the said G. W. Hand and his successors, vicars for the time being of the said parish church, the yearly rent of 3*l*. payable quarterly, on the four most usual feasts; the lessees being charged with the reparations, and subject to the covenants and agreements therein expressed and contained; and which said lease was duly confirmed by the patron and ordinary.

The said G. W. Hand departed this life many years since; after his decease the Rev. William Holmes was duly presented and instituted to and inducted into the vicarage of the parish and parish church of St. Giles Without, Cripplegate, aforesaid.

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In the month of October, 1830, there were less than three years unexpired of the said term of forty years so granted as aforesaid, and the said William Holmes being then such vicar as aforesaid, duly executed another indenture of lease, bearing date the 8th of October, 1830, and made or expressed to be made between him William Holmes as such vicar, of the one part, and James William Vivian and Christopher Hodgson of the other part, whereby, for the considerations therein expressed, the said William Holmes did demise unto the said J. W. Vivian and C. Hodgson, all that messuage, house, or building, situate and being in Fore Street, in the parish of St. Giles Without, Cripplegate, London, called the *Quest House, and used by the inhabitants of the said parish as a vestry house, and the rooms and other

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appurtenances thereto adjoining and belonging, and therewith used and enjoyed; and also all and every the messuages, tenements, shops, and buildings therein and hereinafter particularly mentioned, that is to say, all those four messuages or tenements situate, standing, and being in Fore Street, in the said parish of St. Giles Without, Cripplegate, London, then or late in the several tenures or occupations of W. W. &c.; and also all that piece or parcel of ground on which stood a building theretofore called Pratt's Buildings, and on which then or late stood the back part or parcel of three messuages or tenements and out-buildings, situate in Fore Street aforesaid, formerly in the tenure or occupation of I. R. &c., and then or late of J. W. &c. together with the small piece or parcel of ground thereunto adjoining, and then laid into the yard or backsides of the said three messuages; and also all that small house or shop in Fore Street aforesaid, formerly in the tenure or occupation of A. S. &c., and then or late of M. D.; and also the ground on the north side of the said church, on which stood a wall and palisadoes; together with all the appurtenances to the said quest house and premises belonging, as the same premises were more particularly described in the plan drawn in the margin of the same indenture; to hold the same unto the said J. W. Vivian and C. Hodgson, their executors, administrators, and assigns, from the making of the said indenture, for the term of twenty-one years thence next ensuing (subject nevertheless to the aforesaid existing lease of the same premises, bearing date the 30th of October, 1793, as hereinbefore particularly mentioned;) yielding and paying, therefore, yearly, during the said term of twenty-one years, unto the said W. Holmes and his successors, vicars, as aforesaid, the *rent or sum of 3*l.*, payable quarterly on the four most usual feasts, by equal portions; the first payment to be made on the Feast-day of the birth of our Lord Christ, then next ensuing: the lessees being charged with the reparations, and subject to the covenants and agreements on the lessee's part therein contained:

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Which last mentioned lease was duly confirmed by the patron and ordinary.

The said W. Holmes departed this life in the month of June, 1833.

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The question for the opinion of the Court was, whether the said last mentioned indenture of lease was a valid and effectual lease, and binding upon the successor of the said W. Holmes in the said vicarage, for the remainder of the said term of twenty-one years, expressed to be thereby granted.

[The case having been argued, the Court in the following Term gave judgment.]

[322] TINDAL, Ch. J. :

As the question which has been sent for our consideration by his Honour the VICE-CHANCELLOR has been long considered as *rexata questio* in the law, it may be more satisfactory that we should explain the grounds upon which our certificate, in answer to that question is founded.

The case states a lease by a vicar, for twenty-one years from its date, made, at the time, when a former lease, for forty years, of the same premises was still in being, but was within three years of its expiration. The subject-matter of the lease consists of certain messuages in the city of London, of which the capital messuage, or dwelling-house, used for the habitation of the vicar forms no part, and the ground demised is of less extent than ten acres : so that the subject-matter of the demise clearly falls within the statute 14 Eliz. c. 11, s. 17; and the question is whether such lease is void, under any of the restraining Acts of Elizabeth.

[323] There are three statutes, and three only, which it will be necessary to consider as bearing on the present question, viz., the 13 Eliz. c. 10, the 14 Eliz. c. 11, ss. 17 and 19, and the 18 Eliz. c. 11, s. 2.

Now the lease in question cannot be held to be made void either by the first or last of the above mentioned statutes. Not by the first, because it is a lease for twenty-one years only from the date, and complies with all the other requisites of that restraining Act. It is, indeed, a lease in reversion ; but there is nothing in that Act to make leases in reversion void. And although the Act, lastly above named, the 18 Eliz. c. 11, s. 2, after pointing out the mischief of granting leases, authorised by

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the former statutes, in reversion, declares the same to be void ; yet, in its terms, it only comprehends those leases in reversion, which are made when the former lease for years is in being, “not to be expired or ended within three years next after the making of any such new lease.” But as the lease in question is made when the former lease, for forty years, was within two years of its expiration by efflux of time, it is not a lease in reversion made void by the operative words of that statute.

So far, therefore, as relates to the first or last of the statutes above referred to, this lease does not become void by either ; that is, neither of those statutes seems to us to apply to the case.

It only remains, therefore, to consider whether, in the statute, 14th of Elizabeth, c. 11, there is any enactment which avoids this lease : and, indeed, the argument, on the part of the defendant, has been put entirely on that statute ; it being contended that the cases of leases of houses in cities, of the description therein contained, are taken entirely out of the first restraining statute, and are made subject to a new law created by the statute of the 14 Eliz. ; and that as the 19th section enacts “that no lease shall be permitted to be made by *force of this Act in reversion,” so the present lease, being a lease in reversion of houses described in the Act, is void by the necessary construction of the statute.

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The first observation that arises on the stat. 14 Eliz. is, that it does not contain within it, from beginning to end, any terms importing the avoidance of any lease whatever ; on the contrary, it is a statute which excepts from the operation of the former avoiding statute, leases of property therein described. It enacts in section 17, “that the branch of the former statute, nor any thing therein contained, shall extend to any houses, &c. (therein described,) but that the same may be demised, as by the laws of this realm and the statutes of the colleges, &c., they lawfully might have been, before the making of the said statute, or lawfully might if the said statute were not.” No words can be more large and explicit to exempt such leases from the whole of the effect of the restraining statute 13 Eliz. ; and although the 19th section goes on to enact “that no lease shall be permitted to be

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made by force of this Act in reversion," there are no words added to declare leases, made contrary to such permission, void. And taking this statute alone, and by itself, it would be a much stronger construction than we feel ourselves warranted to put upon it, to hold that such words can defeat and avoid an estate; when they may be fully satisfied by allowing them to give a right of action to the successor. But, in truth, this statute is not to be construed alone, but with reference to the statute 13 Eliz., and the succeeding statute 18 Eliz. c. 11. For not only are all the Acts made *in pari materia*, but the 14 Eliz. c. 11, is expressly entitled "An Act for the continuation, explanation, perfecting and enlarging of (amongst others) the former statute;" and the 18 Eliz. c. 11, is entitled "An Act for the explanation of the statutes against defeating of dilapidations, &c." The three statutes, therefore, are to *be read together, as forming one law on the same subject-matter; and it may, therefore, be well held that where leases of houses, &c., which are exempted out of the 13 Eliz. by the next statute, the 14th, do not observe the provisions of the latter statute, they fall within the general enactments of the first statute, and are made void thereby; in other words, a lease, not warranted by the 14 Eliz., remains restrained by the 13 Eliz., which makes leases against that Act void. But the lease in question, considered as a lease in reversion, is not, as is above stated, void by the 13 Eliz., and is expressly sanctioned by the 18th.

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No decided case has been brought before us, by the authority of which the present lease is to be declared void. In the case of *Bayley v. Murin* (1), the lease was clearly void under the statute 13 Eliz., being a lease to begin at a future day, and not from the time of granting the lease; and in that case HALE, Ch. J. appears to have thought the lease would have been good, "if it had been to commence presently, there being less than three years to come of the former lease." In *Hunt v. Singleton* (2), the lease of a house for forty years by the Dean and Chapter of St. Paul's, was held not warranted by the 14 Eliz., there being at the time of granting the lease ten years unexpired of the former lease.

(1) Vent. 244; *S. C. Barley v. Munday*, 2 Lev. 61.

Man, 3 Keb. 195; *S. C. Bailey v.* (2) Cro. Eliz. 564.

The case of *The Dean and Chapter of Westminster* (1), decides that the lease in reversion of a house in the city of Westminster for forty years, by the Dean and Chapter of Westminster was void, there being, at the time of granting the lease, 17 years unexpired of the former lease; and in this latter case the judgment of Ch. J. BRIDGMAN is strong to shew, that a lease made under the circumstances of the present, would be held good. See the judgment more at large in Bridgman's *Rep. 122. And the case of *Crane v. Taylor* (2), does not afford an authority, that a lease for 21 years in reversion, there being only two years to come of the existing lease, would be void; it is an authority for no more than that a covenant to make a lease is not void under the statute 18 Eliz., being made concerning a house in London.

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Upon the whole, therefore, we think this lease is not void, and send our certificate accordingly to the Vice-Chancellor.

The following Certificate was afterwards sent :

"We have heard this case argued by counsel, and are of opinion that the lease, therein mentioned of the 8th of October, 1830, is a valid and effectual lease, and binding upon the successor of the said William Holmes in the said vicarage, for the remainder of the said term of twenty-one years expressed to be thereby granted.

"N. C. TINDAL.

"S. GASELEE.

"J. A. PARK.

"J. VAUGHAN."

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(3 Bing. N. C. 334—354; S. C. 3 Scott, 699; 2 Hodges, 267; 6 L. J. (N. S.) C. P. 47.)

1836.
Nov. 25.
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Mere contiguity of buildings does not of itself give any right of support to the owner of either as against the other, nor does it impose on either owner any duty to give notice to the other of works calculated to withdraw or diminish support. Nor does it, at all events in the absence

- (1) Carter's Rep. 9.
(2) Hob. Rep. 269.
(3) See this case commented on in *Humphries v. Brogden* (1850) 12 Q. B. 750; and referred to in the opinion

of POLLOCK, B. on the questions put by the House of Lords in *Dalton v. Angus* (1879) 6 App. Cas. 740, 746.—R. C. And see remarks in Preface.—F. P.

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of notice of the special character of the adjoining structure, impose the duty of using any particular degree of care in executing any such works. So held by the Ex. Ch. on the second count of the declaration.

The first count alleged that plaintiffs were possessed of a vault adjoining certain walls, and which was of right supported in part by parts of the adjoining wall; that the plaintiffs were of right entitled that their vault should be so supported; and that there were foundations belonging to the vault which plaintiffs ought to enjoy; yet defendant wrongfully removed the wall adjoining the plaintiffs' vault, without taking proper precautions to support it, and wrongfully disturbed the foundations without taking precautions to prevent them from giving way, *per quod*, plaintiffs' vault was damaged by the fall of some materials, which otherwise would not have hurt it, and special loss ensued: Held, by the Court of Common Pleas, to disclose a sufficient right of action.

THE first count of the declaration stated, that the plaintiffs, before and at the times of the committing of the grievances hereinafter mentioned, were lawfully possessed of a certain vault or cellar situate in the city *of London, and used and occupied the same, in and for the purpose of carrying on their trade or business of wine merchants; and that the plaintiffs kept and had in their said vault or cellar divers large quantities of wine, to wit, 30,000 bottles of wine, and divers, to wit, 3,000 bottles of the plaintiffs of great value, to wit, of the value of 2,000*l*. That before and at the times of the committing of the grievances by the defendant as hereinafter next mentioned, the plaintiffs' said vault or cellar adjoined certain other vaults, and certain walls there, and in part rested upon, and was of right in part supported by part of the said adjoining vaults and of the said walls; and the plaintiffs before and at and during those times were of right intitled that their said vault or cellar should be so supported in part by the said parts of the said adjoining vaults and walls without the hindrance or disturbance of any person. That before and at the times of the committing the grievances hereinafter mentioned, there were certain foundations belonging to, and supporting, the said vault or cellar of the plaintiffs, and that they of right had enjoyed, and still of right ought to enjoy, such foundations, and the benefit and advantage thereof, for the support of their said vault or cellar, without the hindrance or disturbance of any person. Yet the defendant, well knowing the premises, but contriving and intending to injure the plaintiffs heretofore, to wit, on the 1st of October, 1835, and on

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divers other days and times afterwards and before the commencement of this suit, wrongfully and injuriously took down, pulled down, and removed, and caused and procured to be taken down and removed, the said vaults and walls so adjoining the said vault or cellar of the plaintiffs, by which the said last-mentioned vault or cellar was so in part supported as aforesaid, without shoring up, propping up, or otherwise securing or taking other reasonable and proper precautions to support or secure* or shore up the said vault or cellar of the plaintiffs, so as to prevent the same from giving way, or being weakened or damaged or destroyed on that occasion; and also then and there wrongfully and injuriously dug, and made and caused and procured to be dug and made, divers excavations in the earth near to the said foundations of the said vault or cellar of the plaintiffs, and loosened weakened and disturbed such foundations, without taking due and proper precautions to prevent the said foundations from being weakened and injured, and giving way; and by reason thereof, the said foundations then became and were injured, loosened, and weakened; and the said vault or cellar of the plaintiffs became and was greatly injured and weakened; and by reason of the said several premises, and also by reason of certain timber, wood, bricks, and mortar, and other things afterwards, to wit, on &c., falling upon the said vault or cellar of plaintiffs (and which vault or cellar by reason of the same having been so weakened and injured as aforesaid, and on no other account, was then unable to bear or resist the force, weight, and pressure of the said timber, wood, bricks, and mortar, and other things, as the same otherwise might and would have done), the same vault or cellar of the plaintiffs, then, to wit, on &c., gave way and fell in, and became and was greatly injured and destroyed; and by reason of the several premises a great part, to wit, one half of the said wine became wasted lost, spoiled and destroyed, and the residue thereof, became, and was, and still is injured and deteriorated in value, and the said bottles were damaged and destroyed; and thereby also the plaintiffs from thence hitherto, lost and became deprived of the use of their said vault or cellar, and of the profits, benefits and advantages which they otherwise might and would have acquired from the

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possession and use thereof, and the same became of no *use or value to the plaintiffs: and thereby the plaintiffs were greatly prejudiced and injured in their said trade and business, and necessarily incurred divers expenses, to wit, to the amount of 2,000*l.* in having their said vault or cellar examined and surveyed, and the nature and extent of the said damages, injuries, and losses ascertained and repaired; and in and about the removal of the ruins of the said vault or cellar, and of such of the said wines as were not wholly lost and destroyed, and in and about the removal of the said wine and said bottles and pieces thereof, and the procuring the said vault or cellar and the ruins thereof and the said wine and bottles to be watched and taken care of during the times aforesaid, and otherwise in relation to the several premises and matters last aforesaid; and were otherwise injured.

Second count. That before and at the times of committing the grievances hereinafter mentioned, the plaintiffs were possessed of a certain other vault situate in London aforesaid, and used and occupied the same in and for the purposes of carrying on their said trade and business of wine merchants, and kept and had in their said vault divers large quantities of wine, to wit, &c., and bottles of the plaintiffs of great value, to wit, of the value of 2,000*l.* That at the time of the committing of the grievances hereinafter mentioned, the defendant was about to pull down, and prostrate, and remove, and did pull down and prostrate certain other vaults, and buildings, and walls next adjoining the last-mentioned vault of the plaintiffs; and thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' last-mentioned vault in that behalf, to give due and reasonable notice to the plaintiffs of his, the defendant's, intention to pull down, prostrate, and remove the said vaults, buildings, and walls so adjoining the plaintiffs' last-mentioned vault, before the defendant prostrated and removed *the same, so as to enable the plaintiffs to protect themselves in that behalf; and also to use due care and skill, and take due reasonable and proper precautions in and about the pulling down, and prostrating, and removing the said vaults, buildings, and walls so adjoining the plaintiffs' last-mentioned

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vault, so that for want of such care, skill, and precaution, the last-mentioned vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof. Yet the defendant not regarding his duty in that behalf, but contriving and intending to injure the plaintiffs, heretofore, to wit, on &c., and on divers other days and times afterwards, and before the commencement of this suit, wrongfully and injuriously pulled down, prostrated and destroyed the said vaults, buildings, and walls so adjoining the last-mentioned vault of the plaintiffs, without giving the plaintiffs or either of them due or reasonable or other notice of his, the defendant's, intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' said last-mentioned vault: and the defendant did not, nor would use due care or skill, or take due, reasonable, or proper precautions, in or about the pulling down, or prostrating, or removing the said vaults, buildings, and walls so adjoining the last-mentioned vault of the plaintiffs, upon the said last-mentioned occasion, according to his said duty; and the defendant contriving and intending to injure the plaintiffs, heretofore, to wit, on &c., and on the said other days and times after that day and before the commencement of this suit, wrongfully and injuriously pulled down and prostrated divers parts of the said vaults, buildings, and walls so adjoining the last-mentioned vault of the plaintiffs upon the last-mentioned occasion, in a careless, unskilful, and improper manner, and behaved and conducted himself *carelessly, unskilfully, and improperly in that behalf; and by reason of the several premises in this count mentioned, the last-mentioned vault of the plaintiffs became and was greatly shaken, and weakened, and injured; and, by reason of the several premises in this count before mentioned, and also by reason of certain timber, wood, bricks, and mortar, and other things afterwards, to wit, on &c., falling upon the said last-mentioned vault of the plaintiffs (and which vault by reason of the same having been so shaken, weakened, and injured as aforesaid, and on no other account, was then unable to bear or resist the force, weight, and pressure of the last-mentioned timber, wood, brick, and mortar, and other things, as the same otherwise might and

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TROWER would have done,) the last-mentioned vault of the plaintiffs
v. then, to wit, on &c., was damaged (as in the first count).
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Pleas. First, not guilty. Second, that the said vault or cellar of plaintiffs in the first count mentioned did not rest upon, nor was of right in part supported by parts of the said adjoining vaults, and of the said walls in that count mentioned, in manner and form as the plaintiffs had in that count alleged : and of that the defendant put himself upon the country, &c.

Third. That the plaintiffs were not before, and at and during the times in the said first count in that behalf mentioned, or at any of those times, of right entitled that their said vault or cellar should be supported by the said parts of the said adjoining vaults and walls in that count mentioned, in manner and form as the plaintiffs had in that count alleged : and of that, the defendant put himself upon the country, &c.

[*340] Fourth. As to so much of the first count as related to the defendant not shoring up, propping up, or otherwise securing or taking other reasonable or proper precautions to support, or secure, or shore up the said vault *or cellar of the plaintiffs in that count mentioned, so as to prevent the same from being weakened, or damaged, or destroyed, on the occasion in the said first count mentioned ; that the defendant was not on the occasion in that count mentioned, or otherwise, bound by law or otherwise, nor was there any duty, obligation, or liability imposed, or cast by law or otherwise upon him to shore up, prop up, or otherwise secure, or to take other reasonable or proper or any means to support, or secure, or shore up the said vault or cellar of the plaintiffs for the purposes in that count mentioned, or otherwise : and that, the defendant was ready to verify.

Fifth. As to so much of the said first count as related to the defendant not having taken due and proper precautions to prevent the said foundations of the said cellar of the plaintiffs from being weakened, injured, and giving way, as in that count mentioned ; that the defendant was not on the occasion in that count mentioned, or otherwise, bound by law or otherwise, nor was there then any duty, obligation, or liability, cast or imposed by law or otherwise upon him the defendant, to take due and proper, or any precautions to prevent the said foundations of the said vault

or cellar of the plaintiffs, in that count mentioned, from being weakened and injured: and that, the defendant was ready to verify.

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Sixth. As to so much of the said first count as related to the falling of the said timber, wood, bricks and mortar, and other things, upon the said vault or cellar; that the said falling of the said timber, wood, bricks and mortar, and other things, upon the said vault or cellar, was not, nor was the falling of any of them or any part of them, caused or occasioned by any act, default, neglect, or omission of the defendant, or the breach or neglect of any duty, obligation, or liability imposed *or cast upon him by law or otherwise: and that, he was ready to verify.

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Seventh. That the defendant had good, lawful, and sufficient right, title, power, and authority, to pull down, prostrate, and remove, the said vaults and walls in the said first count mentioned, and upon part of which the vault of the plaintiffs was in and by that count alleged to have rested and been supported; and that the digging and making the said excavations in the earth, in that count mentioned, were necessary and proper works for that purpose; and that if the said foundations of the said vault or cellar, in that count mentioned, were loosened, weakened, or disturbed, they were so loosened, weakened and disturbed by and by reason of such necessary and proper works as aforesaid, for the purpose aforesaid: and further, that the plaintiffs, before any damage or injury was or could be done, or caused to be done to them, or their said vault, or the contents thereof, and in sufficient time to guard and protect themselves and their said vault or cellar and its contents, against the consequences of the defendant's pulling down, prostrating, and removing the said vaults, and the necessary and proper works for that purpose, had notice of his intention to pull down, prostrate, and remove the said vaults and walls, and if they were minded and desirous to protect themselves or their property in the premises, against the consequences of the defendant's so pulling down the said vaults and walls, it was their duty to have properly shored up and supported their vault or cellar, or to take due and proper precautions to protect themselves and their said vault or cellar and the property therein, against the consequences of the exercise

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by the defendant of the said lawful right of the defendant to pull down, prostrate, and remove the said vaults and walls on which the vault of the plaintiffs, in that count mentioned, was alleged *in part to have rested and to have been supported; and had they done their duty in that behalf, their said vault or cellar and its contents would have been saved and protected from the alleged damage and injuries in the first count mentioned; but they wholly neglected and omitted so to do. And the defendant further said, that in pulling down, prostrating, and removing the said vaults and walls, he was not guilty of any unlawful or wrongful act, neglect, default, or breach of any duty imposed upon him, by law or otherwise, but exercised his said lawful right, in the manner he had lawful right to exercise the same, and not otherwise: and if any injury or damage happened or was occasioned to the plaintiffs, or their said vault, or the contents thereof, the same happened and was occasioned by the default of the plaintiffs themselves, in not properly shoring up and supporting their said vault, and taking due and proper precautions to protect themselves and their said vault or cellar and its contents, from the consequences of the exercise by the defendant of his said lawful right, to pull down, prostrate, and remove, and in pulling down, prostrating and removing the said vaults and walls; and not by or through any unlawful or wrongful act of the defendant, or any default or omission of the defendant of any duty or obligation, imposed on him by law or otherwise, in the pulling down, prostrating, and removing the vaults and walls: and that, he was ready to verify.

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Eighth. As to so much of the last count as related to the defendant not having given the plaintiffs due and reasonable notice of his intention to pull down, prostrate, and remove the said vaults, buildings, and walls in that count mentioned; that the defendant was not bound by law, or otherwise, nor was there any duty, obligation, or liability imposed or cast on him, by law or otherwise, to shore up or protect the said last-mentioned vaults of *the plaintiffs, on the occasion in that count mentioned, or otherwise; nor was it his duty, in the event of not shoring up or protecting the said last-mentioned vault of the plaintiffs, to give due, or reasonable, or any notice of his the defendant's

intention to pull down, prostrate, and remove the said vaults, buildings, and walls adjoining the vault of the plaintiffs in that count mentioned, in manner and form as the plaintiffs had, in that count, alleged: and of that, the defendant put himself upon the country, &c.

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Eleventh. As to so much of the said last count as charged it to have been the duty of the defendant to have taken due and reasonable precautions in and about the pulling down, and prostrating, and removing the said vaults, walls and buildings in that count mentioned, so that the said last mentioned vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed, or the plaintiffs injured in respect thereof; that it was not his duty to have used due and proper or any precautions in that behalf, as the plaintiffs had in that count alleged: and of that, he put himself upon the country, &c.

Twelfth. As to so much of the said last count as related to the falling of the said timber, wood, bricks and mortar, and other things, upon the said vault of the plaintiffs; that the said falling of the said timber, wood, bricks and mortar, and other things, upon the said vault of the plaintiffs, in that count mentioned, was not, nor was the falling of any of them, or any part of them, caused, or occasioned, by any act, default, omission, or neglect of the defendant; or the breach, or neglect, of any duty, obligation, or liability imposed or cast upon him, by law or otherwise: and that, the defendant was ready to verify.

Thirteenth. As to the last count of the declaration, that the defendant had good and lawful and sufficient *right, title, power and authority to pull down, prostrate and remove the said vaults, walls, and buildings in the said last count mentioned, and therein stated to have been pulled down, prostrated, and removed by him; and that the plaintiffs had notice of his intention so to do before any damage or injury was or could be done, or caused to be done to their said vault or cellar, and the contents thereof, or any part of such contents, in sufficient time to have enabled them to guard and protect themselves against the consequences thereof, if they had been minded or desirous so to do; and if they had been so minded or desirous it was their duty to have shored up and supported their said vault in that count

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mentioned; or to have taken other due and proper precautions to have protected themselves, and their said last-mentioned vault and its contents, against the consequences of the exercise, by the defendant, of his said right and authority to pull down, prostrate, and remove, and in and about the pulling down, prostrating, and removing the said vaults, walls, and buildings in that count mentioned; and had they done their duty in that behalf, their said last-mentioned vault and its contents, would have been saved and protected from the alleged damage and injuries in the last count mentioned; but they wholly neglected and omitted so to do. And the defendant further said that in pulling down, prostrating, and removing the vaults, walls, and cellars in that count mentioned, he was not guilty of any unlawful or wrongful act, or neglect, or default of any duty imposed on him by law or otherwise, but exercised his said right and authority in the manner he had right and authority to exercise the same; and if any damage or injury happened, or was occasioned to the plaintiffs, or their said vault or its contents, in that count mentioned, the same happened and was occasioned by the default of the plaintiffs themselves, in not properly shoring up *or supporting their said last-mentioned vault, or taking due and proper precautions to protect themselves, and their last-mentioned vault and its contents, against the consequences of the exercise by the defendant of his said right and authority to pull down, prostrate, and remove, and in and about the pulling down, prostrating, and removing the vaults, walls, and buildings in that count mentioned, and not by or through any unlawful or wrongful act of the defendant, or any neglect or omission of defendant, of any duty or obligation imposed upon him, by law or otherwise, in and about the pulling down, prostrating, and removing the said vaults, buildings, and walls in the said last count mentioned: and that, he was ready to verify, &c.

By their replication the plaintiffs joined issue on the first, second, third, and tenth pleas; traversed the ninth; and demurred to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last, for the following causes:

That the fourth plea traversed matter of law, namely, whether

it was the defendant's duty to shore up the plaintiff's vault ; offered an immaterial issue in so doing, and was an informal traverse. TROWER
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The causes of demurrer to the fifth plea were similar to those of the fourth plea as applied to the foundations of the plaintiffs' vaults.

The causes of demurrer to the sixth plea were chiefly that it traversed mere matter of law ; offered an immaterial issue ; and should have concluded to the country, &c.

The causes of demurrer to the seventh plea were, chiefly, that the plea did not traverse the plaintiffs' right, but set up that they were bound to support their vault ; the same not being matter material to the cause of action, or proper to be referred to a jury ; that the plea traversed mere matter of law ; that the traverses *were uncertain, &c. ; and that the plea did not answer all it professed to answer. [*316]

The causes of demurrer to the eighth plea were similar to those to the fourth.

The objections to the eleventh plea, were chiefly that it offered to refer to a jury mere matter of law, namely, whether the defendant was bound to use the precautions stated, and that no grounds of excuse for not using such precautions were alleged.

The objections to the twelfth plea were similar to those of the fourth and fifth ; chiefly, that a mere question of law was attempted to be traversed, and that an immaterial issue, whether the defendant caused the timber, &c. to fall on the vault, was proffered.

The causes of demurrer to the last plea were, chiefly, that matter of law was traversed, and an immaterial point attempted to be put in issue ; that the traverse was argumentative and informal ; and that the plea did not deny, or confess, or avoid.

The case was argued in Trinity Term, by

R. V. Richards, in support of the demurrer :

The three first pleas contain the only legitimate defence to this action. The fourth plea traverses the existence of a duty or obligation which is nowhere alleged in the declaration. The plaintiffs have declared on their own right, not on any duty in

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the defendant. Besides the existence of the supposed right is a matter of law, not a question of fact for the consideration of a jury. The fifth plea is open to the same objections. The sixth also offers an issue of law for the consideration of the jury, and confesses, without avoiding that part of the charge in the declaration to which it professes to be an answer: it is no answer to the claim set up by the plaintiffs, but only to the immediate consequence of the defendant's *wrongful act. The seventh plea is pleaded to the whole of the declaration, but contains no answer to the complaint as to digging the earth, and disturbing the foundations of the plaintiffs' cellar. It is also bad, because it only admits hypothetically the disturbance of the plaintiffs' foundations: *Gould v. Lasbury* (1).

The eighth and eleventh pleas raise issues of law instead of questions of fact for the jury: the twelfth is open to the same objection as the sixth: and the thirteenth to the same as the seventh.

In cases of this kind it is sufficient for the plaintiff to declare on his possession, and it is a question of fact for the jury whether the damage complained of has been occasioned by the negligent act of the defendant: *Dodd v. Holme* (2) (where all the cases are collected). In *Wyatt v. Harrison* (3) there was no allegation as here, that the plaintiff had a right to have his house supported by the neighbouring wall or soil, and unless he had, there was no ground for proceeding against the defendant. So in *Peyton v. The Mayor of London* (4), the plaintiff shewed no right to have his house supported by that of the defendant. But in *Jones v. Bird* (5) the question of negligence was left to the jury, and the Court intimated their opinion, that the party doing a work is bound to take care it be not injurious to the adjoining premises. And in *Brown v. Windsor* (6) where the plaintiff had been permitted to rest his building against the defendant's, the defendant was held liable for having carelessly and unskilfully excavated his own

(1) 1 C. M. & R. 254.

(2) 40 R. R. 344 (1 Ad. & El. 493).

(3) 37 R. R. 566 (3 B. & Ad. 871).

(4) 33 R. R. 311 (9 B. & C. 725).

(5) 24 R. R. 579 (5 B. & Ald. 837).

(6) 1 Cr. & J. 20.

soil, so as to sink the wall of his own house and thereby to injure the plaintiff.

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Wightman, contra :

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The declaration is ill. In the first count the plaintiff merely asserts a right to the support of the adjoining premises, without stating the nature of the right ; whether arising from prescription, grant, or simple possession : but as the law gives him no such right from the bare circumstance of juxtaposition, he ought to shew the source from which he derives it : if he were occupying by mere license, the law would give him no claim against the defendant. If the defendant was not bound to shore up the wall, he cannot be charged with negligence in omitting to do so : and the damage of which the plaintiffs complain would not have occurred, but for the falling of the timber which, for aught that appears to the contrary, might have been occasioned by a third person. With respect to the second count, no right is alleged in the plaintiffs, and the circumstance of juxtaposition does not of itself impose upon the defendant the duty of giving notice of an act of ownership on his own property ; or if it does, the nature of the act afforded itself a sufficient notice to the plaintiffs.

The pleas, therefore, which deny that it was the defendant's duty to take the precautions or give the notice required by the plaintiffs, offer an issue which may be properly tried by a jury ; for a jury must ascertain what in point of fact is the nature and extent of the right set up by the plaintiff.

The sixth plea is merely addressed to the fact, whether or not, the falling of the timber was occasioned by the defendant, and is therefore unexceptionable. And the seventh states in substance that the mischief was occasioned by the plaintiffs' own neglect, there being no reason to require caution at the hands of the defendant.

Richards, in reply, being desired to confine himself to the argument on the second count, contended that on the principle, *sic utere tuo ut alienum non lædas*, the defendant was bound to give notice of any use of his own property, likely to be prejudicial to his neighbour.

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Cur. adv. vult.

TROWER TINDAL, Ch. J. :

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This is an action upon the case, the declaration in which contains two counts; in the first of which the plaintiffs allege their possession of a certain vault or cellar adjoining to certain other vaults and walls, and which in part rested upon, and was of right supported in part, by parts of the adjoining vaults and walls; that the plaintiffs were of right entitled that their vault or cellar should be so supported in part; and that there were certain foundations belonging to, and supporting the said vault or cellar, which the plaintiffs ought to enjoy: yet that the defendant wrongfully took down and removed the said vaults and walls so adjoining to the vault or cellar of the plaintiffs, without shoring or propping up, or taking other reasonable or proper precaution to support or secure it, so as to prevent its being weakened or destroyed; and wrongfully dug the earth and disturbed the foundations, without taking due and proper precautions to prevent the said foundations from being weakened and giving way. And the declaration then states the injury which the plaintiffs sustained, and the special damage which followed thereon. The second count states that the defendant was about to pull down the adjoining vaults and walls, and alleges it to have been the duty of the defendant, in the event of his not shoring up the walls, to give notice to the plaintiffs of his intention to pull down, and also his duty to use due care and skill, and to take due, reasonable and proper precaution about the pulling *down his vaults and walls; and then alleges a breach of such duty.

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To this declaration the defendant pleads thirteen pleas, of which the first seven are pleaded to the first count either in part or in the whole, and the eighth and subsequent pleas are pleaded in like manner to the second count of the declaration.

The plaintiffs demur to the fourth, fifth, sixth, seventh, eighth, eleventh, twelfth, and last pleas, assigning certain causes of special demurrer to each; and the defendant having joined in demurrer, the first question arises on the validity of those pleas.

The fourth plea, which is pleaded only to "the not shoring or propping up the wall, or taking other reasonable or proper

precautions to support or secure the vault or cellar of plaintiffs so as to prevent the same from being weakened," we hold to be bad on two grounds. In the first place, the traverse contained in that plea is not the traverse of any allegation to be found in the first count of the declaration. The ground of action on which the plaintiffs rely in that count, is their right to the foundations on which their vault rested; not any duty or obligation of the defendant to prop or shore up the plaintiffs' vault, or to take due and proper precautions in pulling down his own vault. When therefore the defendant traverses the existence of such duty or obligation, he traverses that which is not alleged by the plaintiffs; who only mention the want of propping and shoring up, and the want of proper precaution by the defendant, as the description of the mode or means by which the injury to them was occasioned. And the second objection to this plea appears to us to be this, that it raises an issue of law, and nothing else, for the consideration of the jury; viz. whether any duty or obligation was cast by law upon the defendant or otherwise. A jury might indeed try whether there was any duty of *that nature arising from usage or contract—for the existence of any such duty is a mere question of fact—but they cannot try whether there is any such duty or obligation cast upon him by law; for that is a question to be determined only by the Court, and not by the jury.

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On the same grounds, and for the same reason, we hold the fifth plea to be bad in law.

As to the sixth plea of the defendant, it appears to us to be bad also upon two grounds; first, that it is a plea which confesses, without avoiding that part of the charge in the first count, to which it professes to be an answer. This plea is pleaded, not as any answer to the right claimed in the declaration, but to that which is alleged in the first count, as a necessary and immediate consequence from the wrongful act of the defendant; that is, it is pleaded to part of the special damage alleged to have followed from the weakening of the plaintiffs' vault or cellar. But if the vault or cellar of the plaintiffs has been weakened in its walls or foundations by the wrongful act of the defendant, it is no avoidance of the plaintiffs' right of action, as it appears to us, that

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the timber, bricks or materials that fell upon the vault or cellar in its weakened state, were not the property of the defendant, or were not thrown there by his carelessness or negligence; but that the defendant is equally liable to answer for the injury in whomsoever the property of those materials may be; and whether they were placed there by the act of the defendant, or of any other person. The plaintiffs have alleged in their declaration that, but for the wrongful act of the defendant, and the weakened state of the walls, "and on no other account" was the vault unable to bear or resist the weight and pressure of the timber &c. The defendant therefore is the proximate cause of this damage, and appears to us to be answerable for it. And we think this plea is further bad, because it denies an obligation

[*352] *in law, and still further an obligation, which has not even been alleged in the declaration.

The seventh plea is pleaded to the whole of the first count of the declaration. If therefore, professing to give an answer to the whole, it omits any material part, it is bad. Now the first count of the declaration is founded on the alleged wrongful act of the defendant, not only in pulling down the vaults and walls of the defendant, but also in digging the earth and disturbing the foundations of the vault or cellar of the plaintiffs; and to this cause of action, though confessed by the plea, there is no matter of avoidance pleaded in bar.

The remaining pleas to which the plaintiffs have demurred, apply themselves to the last count of the declaration. And of these, we think the eighth plea cannot be supported, inasmuch as it traverses a matter of law. It is pleaded as to so much of the last count as relates to the defendant not having given the plaintiffs due and reasonable notice of his intention to pull down his walls. The allegation in this plea, that he was not bound by law or otherwise, nor was there any duty, liability, or obligation imposed on him by law or otherwise, to give any notice of his intention to the plaintiffs, appears to us, to raise a direct question of law upon an issue joined on that plea.

The eleventh plea, which is pleaded to so much of the second count as alleges it to have been the duty of the defendant to have taken due and reasonable precautions about the pulling

down his walls, we hold to be bad for the same reason as the last, viz., that it raises an issue of law, instead of an issue of fact for the jury.

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The twelfth plea falls altogether within the same consideration as the sixth, and is bad for the same reason.

The last plea to the second count of the declaration is bad for the same reason as the seventh plea, which is *pleaded to a similar part of the first count, and sets up precisely the same defence.

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But the defendant contends that, admitting the pleas to be bad, the plaintiffs have shewn no sufficient ground of action either in the first or second count of their declaration.

The first count rests upon a precise and distinct allegation, that the vault or cellar of the plaintiffs was, of right, supported by parts of the adjoining walls, and that the plaintiffs were, of right, entitled to have them so supported, and that there were certain foundations for supporting those vaults which the plaintiffs ought to enjoy : and the count then proceeds to allege, as part of the gravamen, that the defendant wrongfully dug the earth, and disturbed the foundations, without taking due and proper precautions to prevent the foundations from being weakened. And we think, without entering into the examination of the several cases cited by the plaintiff, this count contains a clear and substantial ground of action, viz., that of negligence and carelessness in the exercise of the defendant's rights, by reason whereof the plaintiffs' rights were injured ; and that if the defendant meant to object that the plaintiffs' right and title was not alleged with sufficient certainty, he ought to have demurred specially to the declaration instead of pleading over.

With respect to the second count of the declaration, the right of action, as stated in that count, appears, in one respect, more doubtful. There is no allegation in this count of any right of easement *in alieno solo*, which forms the plaintiffs' ground of action in the first count. And as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore it up himself, it is objected, and we think, with considerable weight, that no such obligation results, as an inference *of law, from the mere

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circumstance of the juxta position of the walls of the defendant and the plaintiffs. But we think ourselves not called upon, on the present occasion, to decide this question. For the count goes on to allege that it was also the duty of defendant to use due care and skill, and take due reasonable and proper precaution in pulling down his walls adjoining to the plaintiffs' vault, so that for want of such care, skill, and precaution, the plaintiffs' vault might not be injured. We think that duty is clearly imposed by law; and that a breach, which alleges that the defendant conducted himself so carelessly, negligently, and unskilfully, in pulling down his wall, as, by reason thereof, to injure the plaintiffs' wall, is well assigned; and that, inasmuch as this latter allegation of duty is severable from the former, it states a good ground of action.

Upon the whole, therefore, we think the plaintiffs are entitled to judgment on the demurrers filed to the several pleas of the defendant.

Judgment for plaintiffs.

IN THE EXCHEQUER CHAMBER.

CHADWICK v. TROWER.

(6 Bing. N. C. 1—11; S. C. 8 Scott, 1; 8 L. J. (N. S.) Ex. 286.)

1839.
[6 Bing.
N. C. 4]

THE cause, as to the issues of fact, was tried before Tindal, Ch. J., at the sittings at Guildhall after Hilary Term, 1837, when a verdict was found for the plaintiffs below, on all the issues, with general damages.

The defendant below afterwards brought a writ of error, and assigned for error that the verdict of the jury applied to the second as well as the first count of the declaration, and that the second count was bad in law.

Wightman, for the defendant below :

The damages are assessed generally. It cannot be ascertained whether they were given on the first count, or on the second, or on both; and, therefore, if either of the counts be ill, there must

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be a *renire de novo*. But the second count cannot be supported in law; for it avers that it was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' vault, to give notice to the plaintiffs of his intention to pull down the vaults and walls adjoining; the count, however, contains no allegation of any right of easement *in alieno solo*, and no obligation to give such notice results as an inference of law from the mere circumstance of the juxtaposition of the walls of the plaintiffs and the defendant. At the trial, upon proper questions put to the jury, the damages might have been confined to that part of the count which alleges the injury to have been occasioned by the defendant's neglecting his duty to use due care and skill in pulling down his own wall: *Peyton v. Mayor of London* (1); but no such appropriation having been made, for aught that appears, the jury may have assessed the damages for want of a notice which the defendant was not bound to give, at all events, upon such a state of facts as is set forth in the second count; for it is not alleged even that the defendant knew of the existence of the plaintiffs' wall, and without such knowledge he could not be required to give notice of his own intentions.

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W. H. Watson, for the plaintiffs below :

The second count may be sustained, even if the duty of giving notice ascribed to the defendant do not exist. But that duty is necessarily implied by law, although no case has yet decided the express point; for actions have been maintained for injuries occasioned by the act of a neighbour, without alleging the act to have been done either negligently or wrongfully. Thus, in *Slingsby v. Barnard* (2), it is laid down, that if a man dig a pit in his own land so near to my house, that the house falls, an action on the case lies; and in *Jones v. Bird* (3) it was held, that Commissioners of Sewers and persons working by their order in the course of the necessary repair of a sewer in the neighbourhood of houses are bound to take all such proper precautions for securing them, and to shore them up, if necessary, as skilful persons would do; also to give specific notice to the owners of

(1) 33 R. R. 311 (9 B. & C. 725).

(3) 24 R. R. 579 (5 B. & Ald.

(2) 1 Roll. Rep. 430.

837).

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adjoining houses of the danger arising from the construction of the sewer. In *Peyton v. The Mayor of London*, the Court abstained from giving any opinion on the point now in contest: but in *Brown v. Windsor* (1), where the plaintiff's house was built in 1803, against the pine-end wall of the defendant's house, by permission, and the defendant, in 1829, made an excavation in a careless and unskilful manner in his own land, near to his pine-end wall, by which he *weakened his pine-end wall and injured the plaintiff's house, it was held, that an action on the case was maintainable for the injury; and GARROW, B., said, "There may be cases where a man altering his own premises cannot support his neighbour's, and the support, if necessary, must be supplied elsewhere: in such case he must give notice, and then, if any injury occur, it would not be occasioned by the party pulling down, but by the other party neglecting to take the precaution." Then, in *Dodd v. Holme* (2), the plaintiff and defendant having adjacent lands, the former built a house at the extremity of his land; the latter afterwards excavated his own soil near to but without touching the ground so built upon: The declaration alleged that the defendant, so negligently, unskilfully, and improperly, dug his own soil, that the plaintiff's house was thereby injured: BOLLAND, B., in his summing up, said, "If I have a building on my own land, which I leave in the same state, and my neighbour digs in his land adjacent, so as to pull down my wall, he is liable to an action:" and the jury having found that the injury to the house was the consequence of the defendant's negligence, the Court refused to disturb the verdict for the plaintiff. If, then, it be a duty imposed on a party not to do work so incautiously as to injure his neighbour's rights, it is clearly a want of proper caution to omit giving such notice as may enable the neighbour to take steps for his own security.

(PARKE, B.: The duty of giving notice in such cases seems to be one of those duties of imperfect obligation which are not enforced by the law.)

Then, the allegation of want of notice may be rejected as surplusage, and the damages be ascribed to that part of the

(1) 1 Cr. & J. 20.

(2) 40 R. R. 344 (1 Ad. & El. 493).

count which is unobjectionable. The gravamen of the charge is the defendant's omission to use due *care, skill, and precaution in pulling down his own walls. No injury is alleged to have resulted to the plaintiffs from the want of notice in particular; and, after verdict, the Court will not assume it. In 2 Wms. Saund. 171 c, it is laid down, that "if an action be brought for speaking words all at one time, that is, all in one count, and there is a verdict for the plaintiff, though some of the words will not maintain the action, yet, if any of the words will, the damages may be given entirely; for it shall be intended that the damages were given for the words which are actionable, and that the others were inserted only for aggravation." In *Lawrie v. Dyeball* (1), on a writ of error brought to reverse a judgment in ejectment (2), which had been entered up generally for the plaintiff below, the ejectment having been brought for a messuage and tenement, Lord TENTERDEN said, "If ejectment lies for a tenement of any kind, this may be deemed to have been such a tenement. If not, the damages may all be applied to the messuage. It is an established rule, that, where one count contains two claims or complaints, for one of which the action is maintainable and not for the other, all the damages may be applied to the good cause of action. Where they are stated in separate counts, it is different."

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(PATTERSON, J.: There is a precise issue here upon the fact of notice; and the jury have found that there was none.)

But *W'yatt v. Harrison* (3), and the authorities before cited, shew that negligence and want of caution are of themselves a sufficient ground of action.

Wightman, in reply:

Still, the damages may have been given for want of notice, and unless it can be *shewn that they were not so given, the verdict cannot stand.

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(1) 8 B. & C. 70; 2 Man. & Ry. 1 M. & P. 330.

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(3) 37 R. R. 566 (3 B. & Ad. 871).

(2) See *Doe d. Lawrie v. Dyeball*,

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We are unanimously of opinion that the judgment of the Court below must be reversed. The question arises upon the second count of the declaration, which states that the plaintiffs were possessed of a certain vault and of certain wine therein, and that the defendant was about to pull down and did pull down and prostrate certain other vaults and walls next adjoining the vault of the plaintiffs: the count then goes on to state that thereupon it became and was the duty of the defendant, in the event of his not shoring up or protecting the plaintiffs' walls, to give due and reasonable notice to the plaintiffs of his, the defendant's, intention to pull down his vaults and walls, before the defendant prostrated and removed the same, so as to enable the plaintiffs to protect themselves: it then goes on to allege another duty in the defendant, viz. to use due care and skill, and take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, &c. so adjoining the plaintiffs' vault, so that, for want of such care, skill, and precaution, the plaintiffs' vault and its contents might not be damaged or destroyed, or the plaintiffs be injured in respect thereof; and it then proceeds to allege as a breach that the defendant wrongfully and injuriously pulled down, prostrated, and destroyed the vaults, &c. so adjoining the plaintiffs' vault, without giving them due or reasonable or other notice of his, the defendant's, intention so to do, according to his said duty in that behalf, although the defendant did not shore up or protect the plaintiffs' vault, and the defendant did not nor would use due care or skill, or take due, reasonable, or proper precautions in or about the pulling down or prostrating or removing the vaults, *&c., so adjoining the plaintiffs' vault, upon that occasion, according to his said duty. And a general verdict has been found for the plaintiffs, with general damages.

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The plaintiffs do not in this count allege any right to have their vault supported by the vaults or walls of the defendant; therefore no right of theirs has been injured by the act of the defendant. The duty to give notice is charged as one arising from the contiguity of the defendant's vault to that of the plaintiffs'. No doubt can be entertained as to the opinion of

the Court of Common Pleas upon this question. The LORD CHIEF JUSTICE, in delivering the judgment of the Court, says, "There is no allegation in this count of any right of easement *in alieno solo*, which forms the ground of the plaintiffs' action in the first count. And, as to the allegation that it was the duty of the defendant to give notice to the plaintiffs of his intention to pull down his wall, if he did not shore up himself, it is objected, and we think with considerable weight, that no such obligation results, as an inference of law, from the mere circumstance of the juxta-position of the walls of the defendant and the plaintiffs." We also think it is impossible to say that under such circumstances the law imposes upon a party any duty to give his neighbour notice. We are inclined to think that the second count of the declaration has made the breach of this supposed duty a substantive ground for damages: and the probability is, that the main damage did result from the want of notice; for it is obvious, that, if notice had been given, the plaintiffs might have taken precautions to strengthen their vault. Inasmuch, therefore, as the damages are given generally upon the whole declaration, we think the judgment must be arrested, and a *venire de novo* awarded.

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But, supposing that the improperly pulling down the defendant's vaults and walls may be treated as the substantive *cause of action, and that the second branch of the argument that has been urged on the part of the plaintiffs is well founded (which we think it is not), then the question arises, whether any such duty as that which is alleged to have been violated is by law cast upon the defendant. The duty alleged to be cast upon the defendant by reason of the proximity of his premises to those of the plaintiffs', is, "to use due care and skill, and to take due, reasonable, and proper precautions in and about the pulling down and prostrating and removing the said vaults, buildings, and walls adjoining the plaintiffs' vault, so that for want of such care, skill, and precaution, the vault of the plaintiffs, and the contents thereof, might not be damaged or destroyed on that occasion, or the plaintiffs injured in respect thereof:" and the breach alleged is, "that the defendant did not nor would use due care or skill, or take due, reasonable, or proper precaution in or about the pulling down, prostrating, or removing the said vaults, buildings,

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or walls so adjoining the said vault of the plaintiffs, according to his duty." The question is, whether the law imposes upon the defendant an obligation to take such care in pulling down his vaults and walls as that the adjoining vault shall not be injured. Supposing that to be so where the party is cognisant of the existence of the vault, we are all of opinion that no such obligation can arise where there is no averment that the defendant had notice of its existence: for, one degree of care would be required where no vault exists, but the soil is left in its natural and solid state; another, where there is a vault; and another and still greater degree of care would be required where the adjoining vault is of a weak and fragile construction. How is the defendant to ascertain the precise degree of care and caution the law requires of him, if he has no notice of the existence or of the nature of the structure? We think no such *obligation as that alleged exists in the absence of notice. And, therefore, upon this ground also we think the count is bad; and, consequently, there must be a *venire de novo*.

Venire de novo.

1836.

Nor. 25.

[3 Bing. N. C.
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STAVERS v. CURLING AND ANOTHER (1).

(3 Bing. N. C. 355—371; S. C. 3 Scott, 740; 2 Hodges, 237; 6 L. J. (N. S.) C. P. 41.)

Plaintiff, as captain of a South Sea whaler, covenanted with defendants, that he would proceed to the fishery and procure a cargo of sperm oil, &c. or as great a proportion as might be, under all circumstances, within his power to obtain; would return to London, and at his own cost deliver the cargo; would obey instructions; be frugal of provisions, and not dispose of any of them without accounting for the same; and would not smuggle or trade, or permit any on board to do so:

Defendants covenanted, on the performance of the before-mentioned terms and conditions on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo:

Held, that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to an action on the defendants' covenant.

THE declaration stated that on the 9th of February, 1832, by certain articles of agreement, bearing date the day and year

(1) The cases on the subject of independent covenants will be found fully discussed and considered in *Roberts v. Brett* (H. L. 1865) 11 H. L. C. 337. Compare *Bastin v. Bidwell* (1881) 18 Ch. D. 238.—R. C.

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aforesaid, between the defendants therein described as owners of the ship *Offley*, then lying at Gravesend in the river Thames, of the one part, and the plaintiff of the other part; which said articles of agreement were sealed with the respective seals of the defendants, but being in the possession of the defendants, the plaintiff could not bring them into Court; after reciting that the defendants, as owners of the ship *Offley*, had fitted out the same with all necessary stores, provisions, casks, and other implements for the prosecuting of a voyage to the southern whale fishery; and had appointed the plaintiff to be master of the said vessel, on the terms and conditions thereafter mentioned; it was by the said articles of agreement witnessed, and the said parties did thereby mutually covenant and agree to and with each other, in manner following; that is to say, the plaintiff for himself, his heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree to and with the defendants, their heirs, executors, administrators, and assigns, that he, the plaintiff, would take upon himself the command of the said ship, and proceed in her as soon as she was ready for sea, to the southern whale fishery, and procure a *cargo of sperm oil, head matter, ambergris, whale oil, seal skins, or any other produce, or as great a proportion thereof, as might be under all circumstances within his power to obtain; and having done so, would return in and with the said ship to the port of London, and there at his own costs, together with the crew, discharge and deliver to the defendants, their heirs, executors, administrators, and assigns, whatever cargo the said vessel might have on board; and also that he, the plaintiff, would obey such instructions relative to the said vessel and her voyage, as might from time to time be received by him from the defendants, their heirs, executors, administrators, and assigns; and likewise would be as frugal as possible with the stores and provisions of the said ship, and regularly enter, in a book to be provided for the purpose, the expenditure and appropriation thereof, and not dispose of any part of them without faithfully accounting with the defendants, their heirs, executors, administrators, and assigns, for the produce thereof; and further, that he would not on any account or pretence whatsoever smuggle or trade, or permit it directly or indirectly, whereby the said

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ship, or the owners thereof might be prejudicially affected; or consent or suffer to be committed with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured: and he thereby engaged and bound himself, his heirs, executors, administrators, and assigns to indemnify, in case of such an event, the said owners, from and against any claim, loss, or damage which they might sustain thereby: and the plaintiff thereby engaged on all occasions to act for the interests of the said ship and owners, according to the utmost of his judgment and abilities: and the defendants, for themselves, their heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree that, on the performance of the before-mentioned *terms and conditions on the part of the plaintiff, they, the defendants, their heirs, executors, administrators, and assigns would pay, or cause to be paid unto the plaintiff, his heirs, executors, administrators, and assigns a sum of money, equal to one twelfth part of the nett proceeds which might be received from the sale of the cargo, after deducting the cost of the casks sold with the cargo of the ship, and all custom house expenses, lighterages, pierages outwards and inwards, convoy, dock, and all other duties which were or might thereafter be imposed on ship and cargo, or either of them, together with lighterage, landing, wharfage, quaying, coopering, commissions, and all other charges and expenses attending the landing and sale of the said cargo, together with the amount of any disbursements for refreshments or fresh provisions which might have been made during the voyage by the said master: And further, the defendants agreed to allow to the plaintiff one per cent. upon the aforesaid nett proceeds after the above recited deductions had been made therefrom: as by the said articles of agreement, reference being thereunto had, would more fully and at large appear. And the plaintiff said, that afterwards to wit, on the 1st of March in the year aforesaid, the plaintiff took upon himself the command of the said ship, and the same being ready for sea, then proceeded in her for the southern whale fishery; and afterwards, to wit, on &c., and on divers days between that day and the return of the said ship to the said port of London, as hereinafter mentioned, at and in the said southern whale

fishery, procured for the said ship a cargo, to wit, 374 tons of sperm oil, head matter, ambergris, whale oil, seal skins, and other produce of great value, to wit, of the value of 10,000*l.*, being the best cargo that under all the circumstances, it was in the power of the plaintiff to obtain. That the said cargo being so obtained, and on *board the said ship, afterwards, to wit, on the 1st of January, 1895, the plaintiff, in and with the said ship, the said cargo, being and continuing on board thereof, returned to and arrived at the said port of London, and then and there at the said port at his the plaintiff's own cost, together with the crew of the said ship, discharged and delivered to the defendants the said cargo, being of the value aforesaid. That the plaintiff during the voyage aforesaid, obeyed all instructions relative to the said vessel and her said voyage, from time to time received by him the plaintiff from the defendants, or either of them, and was as frugal as possible with the stores and provisions of the said ship, and regularly entered in a certain book provided for that purpose, the expenditure and appropriation thereof, and faithfully accounted to the defendants for the produce of every part of the stores and provisions aforesaid by the plaintiff disposed of during the voyage. That the plaintiff during the said voyage did not smuggle or trade, or permit it directly or indirectly, whereby the said ship or owners might be or were prejudicially affected, and did not consent or suffer to be committed with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured, but on the contrary thereof the plaintiff on all occasions acted for the interest of the said ship and owners to the utmost of his judgment and abilities; of all which several premises the defendants afterwards, and after the return of the said ship to the port of London, to wit, on &c. had notice. That the said cargo, after the return of the said ship as aforesaid to the port of London, to wit, on &c., was, by the defendants, sold for a large sum, to wit, the sum of 10,000*l.*; and the nett proceeds received by the defendants from the said sale, after deducting the cost of the casks sold with the cargo, and all custom house expenses, lighterages, pierages outwards and *inwards, convoy, dock, and other duties imposed on the said ship and cargo, or either of them, together with lighterage, landing, wharfage,

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quaying, coopering, commissions, and all other charges and expenses attending the landing and sale of the cargo, together with the amount of the disbursements for refreshments and fresh provisions made during the said voyage by the plaintiff, amounted to a large sum, to wit, the sum of 6,000*l.* whereof the defendants then had notice. And thereby and by means of the premises an action had accrued to the plaintiff, to demand and have, of or from the defendants a large sum, to wit, the sum of 500*l.*, being one twelfth part of the said nett proceeds, to wit of the said sum of 6,000*l.*; and thereby also, and by means of the premises an action had accrued to the plaintiff to demand and have, of and from the defendants a certain other large sum, to wit, the sum of 60*l.*, being one per cent. upon the said nett proceeds, to wit, on the said sum of 6,000*l.* Yet the defendants had never at any time paid to the plaintiff the said sums of 500*l.* and 60*l.*, or either of them, or any part thereof.

There was also a count for work and labour, money paid, and on an account stated.

The defendants pleaded, secondly, that after the making of the agreement in the first count mentioned, and before the commencement of the said voyage, to wit, on the 9th of February, 1832, the plaintiff received from the defendants certain instructions relative to the said vessel and her said voyage, whereby the defendants instructed the plaintiff, among other things, during the said voyage to pay the strictest attention to the preservation of the stores of all kinds belonging to the ship, and to be careful in bringing the ship and remaining stores home in the best possible order for undertaking a future voyage: That the plaintiff should cautiously abstain himself, and strictly prohibit all on board the said vessel from engaging *in any sort of trade whatsoever: that the plaintiff should studiously avoid putting in anywhere except when urgent and unavoidable necessity impelled him to do so: that the plaintiff should use his best exertions to obtain in the least possible time a full cargo for the said ship or vessel: should endeavour to maintain order and regularity therein, and to promote the health and comfort of all on board the said vessel during the voyage. That the plaintiff disobeyed the said instructions in this, to wit, that he did not during the

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said voyage pay the strictest attention to the preservation of the stores of all kinds belonging to the ship, and was not careful in bringing the remaining stores home in the best possible order for undertaking a future voyage, but, on the contrary thereof, during the said voyage did carelessly, negligently and wilfully damage and suffer to be damaged, certain stores which had been and were provided, and were during the said voyage the stores of the said ship, and which were not used during the voyage, whereby the same were rendered unfit for undertaking a future voyage; and that the plaintiff also disobeyed the said instructions in this, to wit, that he did not cautiously abstain from engaging in any sort of trade whatsoever, but on the contrary thereof, during the time aforesaid, on divers days between the said 9th of February, 1832, and the 7th of August, 1835, and during the said voyage, was engaged in trade, and did trade for his own personal advantage. That the plaintiff also disobeyed the said instructions in this, to wit, that he did not avoid putting in anywhere except when urgent and unavoidable necessity compelled him so to do, but on the contrary thereof, during the said voyage, put in to divers, to wit, ten ports and ten harbours, and stayed and continued therein for divers long spaces of time, that is to say, for two months in each of the said ports and harbours, although not compelled by *any urgent or unavoidable necessity so to do. That the plaintiff also disobeyed the said instructions in this, to wit, that the plaintiff did not use his best exertions to obtain in the least possible time a full cargo for the said ship or vessel, and did not during the voyage maintain order and regularity in the said vessel, or promote the comfort of all who during the said time were on board the said vessel; but on the contrary, the plaintiff on divers days and times during that time and during the said voyage, to wit, on the 9th of February, 1832, and on divers other days and times between that day and the 7th of August, 1835, was drunk and intoxicated, and caused and suffered disorder and irregularity in the said vessel, although he might and could then have maintained order and regularity therein. That the plaintiff during the said voyage also disobeyed his said instructions in this, to wit, that during the whole of the said voyage, he rendered the said vessel and the said voyage

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uncomfortable to the crew, who during that time were on board the said vessel: and that, the defendants were ready to verify.

Thirdly: That the plaintiff during the said voyage, to wit, on the said 9th of February, 1832, and on divers days between that day and the 7th of August, 1835, did trade in such a manner that the owners of the said ship were prejudicially affected thereby: and of that, the defendants put themselves upon the country, &c. And

Fifthly; So far as related to the non-payment of the said sum of money, in which the defendants were alleged to be indebted to the plaintiff, for the price and value of work done by the plaintiff for the defendants at their request; that the said work was done by the plaintiff for the defendants in and about the taking upon himself the command of the said ship in the first count mentioned, and proceeding in her to the *southern whale fishery as in the said first count mentioned, and in procuring for the same ship a cargo, and in returning in the said ship and in the command thereof to the port of London, and there discharging and delivering to the defendants the said cargo: that such work was done and performed by the plaintiff for the defendants, under and by virtue of the said articles of agreement in the said first count mentioned: and that the plaintiff did, during the said voyage, to wit, on the 9th of February, 1832, and on divers days between that day and the 7th of August, 1835, trade in such a manner that the owners of the said ship were prejudicially affected thereby: and that, the defendants were ready to verify.

Demurrer and joinder.

Whateley, in support of the demurrer [cited *Boone v. Eyre* (1), *Davidson v. Gwynne* (2), *Constable v. Cloberie* (3), *Campbell v. Jones* (4), *Ritchie v. Atkinson* (5), *Puller v. Staniforth* (6), *Storer v. Gordon* (7), *Carpenter v. Cresswell* (8), *Hunlocke v. Blacklowe* (9).]

(1) 2 R. R. 768 (1 H. Bl. 273, n.;
1 Wms. Saund. 320, n. 4).

(2) 11 R. R. 420 (12 East, 381).

(3) Palm. 397.

(4) 3 R. R. 263 (6 T. R. 570).

(5) 10 R. R. 307 (10 East, 295).

(6) 10 R. R. 486 (11 East, 232).

(7) 15 R. R. 499 (3 M. & S. 308).

(8) 29 R. R. 587 (4 Bing. 409).

(9) 2 Wms. Saund. 156.

R. V. Richards, contra, [commented upon these cases, and cited *Rose v. Poulton* (1), and *Glazebrook v. Woodrow* (2)].

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Whateley, in reply [further cited *Hotham v. East India Company* (3), *Porter v. Shephard* (4), and *Thorpe v. Thorpe* (5).]

Cur. adv. vult.

TINDAL, Ch. J. :

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The demurrer to the pleas of the defendant raises the question, whether the performance of the covenants entered into by the plaintiff in the articles of agreement on which this action is founded, forms a condition precedent to the plaintiff's right to recover on the covenants entered into by the defendants.

The rule has been established by a long series of decisions in modern times. that the question whether covenants are to be held dependent or independent of each other, is to be determined by the intention and meaning of the parties as it appears on the instrument, and by the application of common sense to each particular case ; to which intention, when once discovered, all technical forms of expression must give way. And one of the means of discovering such intention, has been laid down with great accuracy by Lord ELLENBOROUGH, in the case of *Ritchie v. Atkinson* (6), to be this, " that where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other ; but where the covenants go only to a part, there a remedy lies on the covenant to recover damages for the breach of it, but it is not a condition precedent."

Now, applying that distinction to the consideration of *the covenant in question, we think the necessary inference is, that it was not the intention of the contracting parties that any of the covenants entered into by the plaintiff, the captain of the ship, should form a condition precedent to his right to recover on the covenant entered into by the defendants, the ship owners, for his stipulated remuneration. Thus, for instance, if the covenant to procure a cargo of sperm oil, &c., or as great a proportion thereof as might be, under all circumstances, within the power of the

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(1) 36 R. R. 761 (2 B. & Ad. 822).

(4) 3 R. R. 305 (6 T. R. 665).

(2) 4 R. R. 700 (8 T. R. 366).

(5) 1 Salk. 171.

(3) 1 R. R. 333 (1 T. R. 638).

(6) 10 R. R. 307 (10 East, 295).

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plaintiff to obtain, be held to be a condition precedent, a very small and trifling deficiency from the best possible cargo, if attributable to any the slightest carelessness on the part of the plaintiff, would occasion the total loss of all his profits of the voyage; whereas, if the breach of the covenant were made the subject of an action by the defendants, the compensation to them for such breach would correspond exactly with the extent of their injury. The same observation applies, in a still stronger degree, to the non-performance of the several other covenants set out and relied upon in the second and last pleas; which covenants might be broken, to the letter, with very little damage resulting therefrom to the ship owner, whilst on the other hand, by treating them as conditions precedent, a trifling injury to one party would occasion the loss of all the remuneration to the other for long and laborious service.

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The parties to such a contract, may undoubtedly, if they think proper, agree that the captain's right to recover any remuneration for his services shall be conditional only, and shall depend on his strict performance of the covenants he enters into; and if words are used in the contract so precise, express, and strong, that such intention, and such intention only, is compatible with the terms employed, however inconsistent *it may be with general principles of reasoning, a court can only give effect to such declared intention of the parties. The only question in every particular case is, whether such intention is so declared. In this case it is insisted on the part of the defendants that such must be considered to be the intention; for that the defendant's covenant is entered into with the plaintiff, not simply in consideration of the plaintiff's covenants and agreements, but "on the performance of the before mentioned terms and conditions on the part of the plaintiff;" which words it is argued must of necessity shew the intention that the performance by the plaintiff must be a condition precedent, and not rest in covenant merely. And if this were *res integra* the argument would undoubtedly be strong. But in the case of *Boone v. Eyre* (1), the leading case on this subject, and in which the distinction before adverted to is first clearly established, the

(1) 2 B. R. 768 (1 H. Bl. 273, n.).

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defendant covenanted that "the plaintiff well and truly performing all and every thing therein contained on his part to be performed," he the defendant would pay the annuity. In that case the performance of the plaintiff's covenant is made the consideration for the defendant's liability according to the strict technical frame of the agreement; but in that case it was held, that the obvious intention of the parties was opposed to it, and such intention was allowed to prevail. The case also of *Hunlocke v. Blacklowe* (1) is strong to shew that courts of justice are more anxious to discover and to be governed by the intention of the parties, than to follow the strict and technical form of words used in the instrument.

We think, therefore, the authorities enable us to give effect in this case to that which appears to us the *intention of the parties; namely, that the ship owners should have their remedy in damages on the covenants entered into by the captain for any loss occasioned by the breach thereof; but that a failure in the full and literal performance of those covenants on the part of the captain should not be set up by the ship owners as an answer to an action on their own covenants. And we therefore give

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Judgment for the plaintiff.

MALACHY v. SOPER AND ANOTHER (2).

(3 Bing. N. C. 371—386; S. C. 3 Scott, 723; 2 Hodges, 217; 6 L. J. (N. S.) C. P. 32.)

1836.
Nov. 25.
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Plaintiff was possessed of certain shares in a silver mine, touching which shares certain claimants had filed a bill in Chancery, to which plaintiff had demurred:

Held, that without alleging special damage, plaintiff could not sue defendant for falsely publishing that the demurrer had been overruled; that the prayer of the petition (for the appointment of a receiver) had been granted; and that persons duly authorised had arrived at the mine.

THE declaration stated that the plaintiff before and at the time of the committing of the grievances by the defendants as

(1) 2 Wms. Saund. 156.

(2) See observations on this case by POLLOCK, B., in *Western Counties Manure Co. v. Lawes Chemical Manure Co.* (1874) L. R. 9 Ex. 218, 223, 43 L. J. Ex. 171, 174. The case is cited

by BOWEN, L. J. in *Hatchiffe v. Evans*, '92, 2 Q. B. 524, 532, 61 L. J. Q. B. 535, C. A., and the principle is confirmed by *White v. Mellin* (H. L.) '95, A. C. 154, 64 L. J. Ch. 308, 72 L. T. 334.—R. C.

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hereinafter mentioned, was possessed of and interested in divers, to wit, 1,600 shares or parts, the whole into divers, to wit, 5,000 shares or parts, to be divided, of and in a certain mine, commonly known and called by the name of the Wheal Brothers, situate, lying, and being in the parish of Calstock, in the county of Cornwall, such shares being of great value, to wit, of the value of 100,000*l*. That before and at the time of the committing the grievances by the defendants as hereinafter mentioned, the said mine had been worked and used, and was then being worked and used, for and on the behalf of the plaintiff and others, the holders of shares and interests in the said mine, to the great benefit, profit, and advantage of the plaintiff, and to the great increase of the value of his said shares. *That, also before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, one Horatio Nelson Tollervey had instituted his certain bill of complaint in writing against Malachy, the plaintiff, and others, in the High Court of Chancery of our Lord the King, and in and by the said bill of complaint the said H. N. Tollervey claimed to be a holder of, and interested in, divers shares in the said mine, and disputed the plaintiff's right to the whole of the said shares, and claimed in himself the said H. N. Tollervey a right in and to a part of the same. And the said H. N. Tollervey did, in and by his said bill of complaint pray that the said Malachy, the plaintiff, and others, might answer the premises therein mentioned, and make a full and true disclosure and discovery of all and singular the matters therein mentioned, and that H. N. Tollervey might be declared to be entitled to $\frac{188}{500}$ th parts or shares of and in the said mine, or to such other part or shares thereof as the said Court should be of opinion that he was entitled to, and that a proper and legal assignment and transfer thereof might be made to him by all necessary parties; that the said Malachy, the plaintiff, and others, might be compelled to come to an account with the said H. N. Tollervey for so much of the profits which had been made in the said mine as, under the circumstances in the bill mentioned, the said H. N. Tollervey had been entitled to receive in respect of his shares, and so far as such profits had been divided among the shareholders, and to pay to the said H. N. Tollervey what should

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be due to him on such account; and also to pay to the said H. N. Tollervey from time to time his share of the profits of the said mine, which should be divided and paid in respect of such shares as therein mentioned; and that the said H. N. Tollervey might also be declared to be entitled to the like share and interest in the future *term therein mentioned to have been granted in the said mine and premises, as he was entitled to in the therein mentioned lease of the 29th of September, 1833; and that he might have the benefit thereof secured to him accordingly; and that the said Malachy, the plaintiff, and others, might be restrained by the order and injunction of the said Court from selling or disposing of, or transferring the said H. N. Tollervey's shares and interest in the said mine, or any other shares or interest in the said mine, to the prejudice of the said H. N. Tollervey's rights and interests therein; and that some proper person might be appointed by the said Court receiver of the said mines and premises, with all usual and proper directions for carrying on the same under the direction of the said Court, to the end that the said H. N. Tollervey's shares of the profits thereon might be properly secured for his benefit; or else that some proper person might be appointed by the said Court as receiver of $\frac{1}{800}$ th parts of the profits of the said mine, with all usual and necessary directions; and that the said Malachy, the plaintiff, and others, might be restrained by the injunction of the said Court from retaining to their own use, or appropriating in any other manner the said H. N. Tollervey's share of the said profit. And such proceedings were had in the same Court, that before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, the said Malachy, the plaintiff, and the others, had demurred to the said bill of complaint, and had demanded the judgment of the said Court of Chancery whether they should be compelled to make any further or other answer to the said bill, or any of the matters therein contained, and they prayed that the same might be thenceforth dismissed. That, also before and at the time of the committing of the grievances by the defendants as hereinafter mentioned, one Richard Deadman *Hayward had exhibited his certain bill of complaint in writing

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ship, or the owners thereof might be prejudicially affected; or consent or suffer to be committed with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured: and he thereby engaged and bound himself, his heirs, executors, administrators, and assigns to indemnify, in case of such an event, the said owners, from and against any claim, loss, or damage which they might sustain thereby: and the plaintiff thereby engaged on all occasions to act for the interests of the said ship and owners, according to the utmost of his judgment and abilities: and the defendants, for themselves, their heirs, executors, administrators, and assigns, did thereby covenant, promise, and agree that, on the performance of the before-mentioned *terms and conditions on the part of the plaintiff, they, the defendants, their heirs, executors, administrators, and assigns would pay, or cause to be paid unto the plaintiff, his heirs, executors, administrators, and assigns a sum of money, equal to one twelfth part of the nett proceeds which might be received from the sale of the cargo, after deducting the cost of the casks sold with the cargo of the ship, and all custom house expenses, lighterages, pierages outwards and inwards, convoy, dock, and all other duties which were or might thereafter be imposed on ship and cargo, or either of them, together with lighterage, landing, wharfage, quaying, cooping, commissions, and all other charges and expenses attending the landing and sale of the said cargo, together with the amount of any disbursements for refreshments or fresh provisions which might have been made during the voyage by the said master: And further, the defendants agreed to allow to the plaintiff one per cent. upon the aforesaid nett proceeds after the above recited deductions had been made therefrom: as by the said articles of agreement, reference being thereunto had, would more fully and at large appear. And the plaintiff said, that afterwards to wit, on the 1st of March in the year aforesaid, the plaintiff took upon himself the command of the said ship, and the same being ready for sea, then proceeded in her for the southern whale fishery; and afterwards, to wit, on &c., and on divers days between that day and the return of the said ship to the said port of London, as hereinafter mentioned, at and in the said southern whale

fishery, procured for the said ship a cargo, to wit, 374 tons of sperm oil, head matter, ambergris, whale oil, seal skins, and other produce of great value, to wit, of the value of 10,000*l.*, being the best cargo that under all the circumstances, it was in the power of the plaintiff to obtain. That the said cargo being so obtained, and on *board the said ship, afterwards, to wit, on the 1st of January, 1835, the plaintiff, in and with the said ship, the said cargo, being and continuing on board thereof, returned to and arrived at the said port of London, and then and there at the said port at his the plaintiff's own cost, together with the crew of the said ship, discharged and delivered to the defendants the said cargo, being of the value aforesaid. That the plaintiff during the voyage aforesaid, obeyed all instructions relative to the said vessel and her said voyage, from time to time received by him the plaintiff from the defendants, or either of them, and was as frugal as possible with the stores and provisions of the said ship, and regularly entered in a certain book provided for that purpose, the expenditure and appropriation thereof, and faithfully accounted to the defendants for the produce of every part of the stores and provisions aforesaid by the plaintiff disposed of during the voyage. That the plaintiff during the said voyage did not smuggle or trade, or permit it directly or indirectly, whereby the said ship or owners might be or were prejudicially affected, and did not consent or suffer to be committed with his knowledge, any illegal act or acts on board the said ship, whereby the owner or owners might be injured, but on the contrary thereof the plaintiff on all occasions acted for the interest of the said ship and owners to the utmost of his judgment and abilities; of all which several premises the defendants afterwards, and after the return of the said ship to the port of London, to wit, on &c. had notice. That the said cargo, after the return of the said ship as aforesaid to the port of London, to wit, on &c., was, by the defendants, sold for a large sum, to wit, the sum of 10,000*l.*; and the nett proceeds received by the defendants from the said sale, after deducting the cost of the casks sold with the cargo, and all custom house expenses, lighterages, pierages outwards and *inwards, convoy, dock, and other duties imposed on the said ship and cargo, or either of them, together with lighterage, landing, wharfage,

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quaying, coopering, commissions, and all other charges and expenses attending the landing and sale of the cargo, together with the amount of the disbursements for refreshments and fresh provisions made during the said voyage by the plaintiff, amounted to a large sum, to wit, the sum of 6,000*l.* whereof the defendants then had notice. And thereby and by means of the premises an action had accrued to the plaintiff, to demand and have, of or from the defendants a large sum, to wit, the sum of 500*l.*, being one twelfth part of the said nett proceeds, to wit of the said sum of 6,000*l.*; and thereby also, and by means of the premises an action had accrued to the plaintiff to demand and have, of and from the defendants a certain other large sum, to wit, the sum of 60*l.*, being one per cent. upon the said nett proceeds, to wit, on the said sum of 6,000*l.* Yet the defendants had never at any time paid to the plaintiff the said sums of 500*l.* and 60*l.*, or either of them, or any part thereof.

There was also a count for work and labour, money paid, and on an account stated.

The defendants pleaded, secondly, that after the making of the agreement in the first count mentioned, and before the commencement of the said voyage, to wit, on the 9th of February, 1832, the plaintiff received from the defendants certain instructions relative to the said vessel and her said voyage, whereby the defendants instructed the plaintiff, among other things, during the said voyage to pay the strictest attention to the preservation of the stores of all kinds belonging to the ship, and to be careful in bringing the ship and remaining stores home in the best possible order for undertaking a future voyage: That the plaintiff should cautiously abstain himself, and strictly prohibit all on board the said vessel from engaging *in any sort of trade whatsoever: that the plaintiff should studiously avoid putting in anywhere except when urgent and unavoidable necessity impelled him to do so: that the plaintiff should use his best exertions to obtain in the least possible time a full cargo for the said ship or vessel: should endeavour to maintain order and regularity therein, and to promote the health and comfort of all on board the said vessel during the voyage. That the plaintiff disobeyed the said instructions in this, to wit, that he did not during the

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said voyage pay the strictest attention to the preservation of the stores of all kinds belonging to the ship, and was not careful in bringing the remaining stores home in the best possible order for undertaking a future voyage, but, on the contrary thereof, during the said voyage did carelessly, negligently and wilfully damage and suffer to be damaged, certain stores which had been and were provided, and were during the said voyage the stores of the said ship, and which were not used during the voyage, whereby the same were rendered unfit for undertaking a future voyage; and that the plaintiff also disobeyed the said instructions in this, to wit, that he did not cautiously abstain from engaging in any sort of trade whatsoever, but on the contrary thereof, during the time aforesaid, on divers days between the said 9th of February, 1832, and the 7th of August, 1835, and during the said voyage, was engaged in trade, and did trade for his own personal advantage. That the plaintiff also disobeyed the said instructions in this, to wit, that he did not avoid putting in anywhere except when urgent and unavoidable necessity compelled him so to do, but on the contrary thereof, during the said voyage, put in to divers, to wit, ten ports and ten harbours, and stayed and continued therein for divers long spaces of time, that is to say, for two months in each of the said ports and harbours, although not compelled by *any urgent or unavoidable necessity so to do. That the plaintiff also disobeyed the said instructions in this, to wit, that the plaintiff did not use his best exertions to obtain in the least possible time a full cargo for the said ship or vessel, and did not during the voyage maintain order and regularity in the said vessel, or promote the comfort of all who during the said time were on board the said vessel; but on the contrary, the plaintiff on divers days and times during that time and during the said voyage, to wit, on the 9th of February, 1832, and on divers other days and times between that day and the 7th of August, 1835, was drunk and intoxicated, and caused and suffered disorder and irregularity in the said vessel, although he might and could then have maintained order and regularity therein. That the plaintiff during the said voyage also disobeyed his said instructions in this, to wit, that during the whole of the said voyage, he rendered the said vessel and the said voyage

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proved; the law presuming that the uttering of the slanderous words, or the publishing of the libel, have of themselves a natural and necessary tendency to injure the plaintiff. But this is an action to recover damages by reason of the publication of a paragraph in a newspaper, which contains no other charge than that the "petition in a bill filed in the Court of Chancery against the plaintiff, and certain other persons as shareowners in a certain mine, for an account, and an injunction, had been granted by the VICE-CHANCELLOR, and that persons duly authorised had arrived in the workings." The publication therefore is one which slanders not the person or character of the plaintiff, but his title as one of the share-holders to the undisputed possession and enjoyment of his shares of the mine. And the objection taken is, that the plaintiff in order to maintain this action, must shew a special damage to have happened from the publication, and that this declaration shews none.

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The first question therefore is, does the law require *in such an action an allegation of special damage? And looking at the authorities we think they all point the same way. The law is clearly laid down in Sir W. JONES, 196 (*Lowe v. Harewood*): "of slander of title, the plaintiff shall not maintain action, unless it was *re verâ* a damage; *scil.*, that he was hindered in sale of his land; so there the particular damage ought to be alleged." And in addition to the cases cited at the Bar, viz. *Sir John Tasborough v. Day* (1), and *Manning v. Avery* (2), the case of *Cane v. Goulding* (3) furnishes a strong authority. That was an action on the case for slandering the plaintiff's title, by speaking these words, viz., "his right and title thereunto is nought, and I have a better title than he." The words were alleged to be spoken *falso et malitiosè*, and that he was likely to sell, and was injured by the words; and that by reason of speaking the words, he could not recover his tithes. After verdict for the plaintiff, there was a motion in arrest of judgment; and ROLLE, Ch. J. said, "there ought to be a scandal and a particular damage set forth, and there is not here:" and upon its being moved again and argued by the Judges, ROLLE, Ch. J. held that the action did not lie, although it was alleged that the words were spoken

(1) Cro. Jac. 484..

(2) Keb. 153.

(3) Style's Rep. 169, 176.

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falso et malitiosè, for “the plaintiff ought to have a special cause; but that, the verdict might supply; but the plaintiff ought also to have shewed a special damage which he hath not done, and this the verdict cannot supply: the declaration here is too general, and upon which no good issue can be joined; and he ought to have alleged, that there was a communication had before the words spoken touching the sale of the lands whereof the title was slandered, and that by speaking of them the sale was hindered;” and cited several cases to that effect.

We hold, therefore, on the authority of these cases, that an action for slander of title is not properly an *action for words spoken, or for libel written and published, but an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff’s title. This action is ranged under that division of actions in the Digests, and other writers on the text law, and such we feel bound to hold it to remain at the present day.

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The next question is, has there been such a special damage alleged in this case, as will satisfy the rule laid down by the authorities above referred to? The doctrine of the older cases is, that the plaintiff ought to aver that, by the speaking, he could not sell or lease (Cro. Eliz. 197, Cro. Car. 140); and that it will not be sufficient to say only, that he had an intent to sell, without alleging a communication for sale (R. 1 Roll. 244). Admitting, however, that these may be put as instances only, and that there may be many more cases in which a particular damage may be equally apparent without such allegation, they establish at least this, that in the action for slander of title, there must be an express allegation of some particular damage resulting to the plaintiff from such slander. Now the allegation upon this record is only this, “that the plaintiff is injured in his rights; and the shares so possessed by him, and in which he is interested, have been and are much depreciated and lessened in value; and divers persons have believed and do believe that he has little or no right to the shares, and that the mine cannot be lawfully worked or used for his benefit; and that he hath been hindered and prevented from selling or disposing of his said shares in the said mine,

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and from working and using the same in so ample and beneficial a manner as he otherwise would have done.” And we are of opinion that this is not such an allegation of special damage as the authorities above referred to require, where the action is not founded on the words spoken or written, but upon the special damage sustained.

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It has been argued in support of the present action, that it is not so much an action for slander of title as an action for a libel on the plaintiff in the course of his business, and in the way of gaining his livelihood, and that such an action is strictly and properly an action for defamation, and so classed and held by all the authorities. But we think it sufficient to advert to the declaration, to be convinced that the publication complained of was really and strictly a slander of the plaintiff's title to his shares, and nothing else. The bill in Chancery, out of which the publication arose, is filed by Tollervey, who disputed the plaintiff's right to the whole of the shares, and claimed in himself a right to part of the same, and prayed that he might be declared to be entitled to some of them; and the only mention made as to the working of the mines, was with reference to the appointment of a receiver to the profits thereof. And we think it would be doing violence to the natural meaning of the terms of the publication, if we were to hold it to be published of the plaintiff in the course of his business or occupation, or mode of acquiring his livelihood, and not as referring to the disputed title of the shares of the mine.

It has been urged, secondly, that however necessary it may be, according to the ancient authorities, to allege some particular damage in cases of unwritten slander of title, the case of written slander stands on different grounds; and that an action may be maintained without an allegation of damage actually sustained, if the plaintiff's right be impeached by a written publication, which of itself, it is contended affords presumption of injury to the plaintiff. No authority whatever has been cited in support of this distinction. And we are of opinion that the necessity for an allegation of actual damage in the case of slander of title, cannot depend upon the medium through which that slander is conveyed, *that is, whether it be through words, or writing, or

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print; but that it rests on the nature of the action itself, namely, that it is an action for special damage actually sustained, and not an action for slander. The circumstance of the slander of title being conveyed in a letter or other publication, appears to us to make no other difference than that it is more widely and permanently disseminated, and the damages in consequence more likely to be serious than where the slander of title is by words only; but that it makes no difference whatever in the legal ground of action.

For these reasons we are of opinion, that the action is not maintainable, and that the judgment must be arrested; and, consequently, it becomes unnecessary to inquire whether the innuendo laid in the declaration is more large than it ought to have been.

We therefore make the rule for arresting the judgment

Absolute.

DOE D. PETER v. WATKINS.

(3 Bing. N. C. 421—426; S. C. 4 Scott, 155; 3 Hodges, 25; 6 L. J. (N. S.) C. P. 107; 1 Jur. 41.)

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An attorney, who, being resorted to by a borrower to raise money for him, peruses, on the part of the proposed lender, the abstracts of the borrower, is not allowed to give evidence concerning them against the borrower.

In this ejectment a verdict was found for the defendant at the trial before Lord Denman, leave being reserved to the plaintiff to move to enter a verdict for himself on a point reserved at the trial.

In case, however, such a motion should be made, the defendant was to be at liberty to move to enter a nonsuit, *on the ground that the evidence of a Mr. Church, on which alone the plaintiff's case rested, had been improperly received at the trial.

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Erans having obtained a rule *nisi* to enter the verdict for the plaintiff, on the point reserved at the trial,

Chilton now on the part of the defendant claimed to enter a nonsuit, on the ground that Church's testimony ought not to have been received, and that without it the plaintiff had no case.

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It appeared that Church was an attorney at Carmarthen, and in the habit of investing money entrusted to him for that purpose by his clients.

Being called as a witness for the plaintiff, he stated that a Mrs. Williams came to him on behalf of her husband, and employed him to raise a sum of money for her husband on the security of some landed property belonging to herself.

Church required to see the abstract of the title to this property, when Mrs. Williams referred him to Jones, an attorney, who afterwards, on Church's application, handed over to Church the abstract and title deeds of the property in question: the title deeds were afterwards returned to Jones, and no money was advanced.

On the refusal of the defendant to produce these title deeds at the trial, Church was allowed to identify the abstract, which he had delivered back to Mrs. Williams.

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Chilton contended that the abstract was a confidential communication to an attorney on the part of a client, who had applied to him to raise money, and that Church's testimony ought not to have been received in evidence. He relied on *Taylor v. Blacklow* (1), where *defendant, an attorney, being employed to raise money on mortgage for plaintiff, disclosed to the proposed lender, certain defects in plaintiff's title, *per quod* plaintiff was subjected to divers actions, at the suit of the proposed lender, was delayed in obtaining the money, and compelled to give a higher rate of interest; and it was held, that that was a breach of duty for which an action lay against the defendant, notwithstanding he had been the attorney of the proposed lender before his retainer by the plaintiff: and on *Doe d. Shellard v. Harris* (2), where PARKE, B. held that an attorney could not be asked whether a party applied to him to draw a certain deed, or asked his advice, for a lawful or an unlawful purpose.

Evans and E. V. Williams, contra:

This was not a privileged communication, because the relation

(1) P. 626. *ante* (3 Bing. N. C. 235).

(2) 5 Car. & P. 392.

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of attorney and client did not exist between Church and Mrs. Williams. Jones was Mrs. Williams's attorney; Church was the attorney of the proposed lender. Mrs. Williams never retained him on her part, but went to him to submit to the ordeal proposed by the intended lender: it was not for her benefit that the abstract was investigated, but for the benefit of the lender; it had been better for Mrs. Williams if the abstract had been adopted without investigation. The ground of all the decisions, is, that the disputed witness has been resorted to as the attorney of the party making the communication; but Mrs. Williams might have delivered this abstract to a law-stationer or common money-lender: in that case could the communication be privileged? The privilege was at first confined to communications made in the progress of a suit, and though it has since been extended, no case has gone so far as the present. *Taylor v. Blacklow* turned on the breach of duty in a professional man towards his employer, and not upon the question of privileged communications. In 2 Sugd. Vend. & Purch. 299 (9th ed.) it is laid down, that "if an attorney put his name to an instrument as a witness, he makes himself thereby a public man; and is no longer clothed with the character of an attorney; his signature binds him to disclose all that passed at the time respecting the execution of the instrument: but not what took place in the preparation of the deed, or at any other time, and not connected with the execution of it. Every person who claims an interest in the property has a right to call upon the attorney as being the attesting witness; nor does this privilege extend to communications from collateral quarters, although made to him in consequence of his character of attorney; the privilege is restricted to communications, whether oral or written, from the client to his attorney; but it is not necessary that a cause should have commenced." So in *Spencely v. Schulenburg* (1) it was held, that an attorney was bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to

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(1) 7 East, 357.

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exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney.

This was a communication from a collateral quarter, and therefore not within the privilege. Suppose in the course of a suit, an admission made by a defendant to the plaintiff's attorney; would that be a privileged communication?

TINDAL, Ch. J.:

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An attorney may properly be concerned for mortgagor and mortgagee, though not for *plaintiff and defendant. The question in this case is, whether it appears on the Judge's notes that when Church was called as a witness, he was speaking to a transaction in which the relation of attorney and client existed between him and Mrs. Williams. Now Church was an attorney, and in the habit of laying out money for his clients. He says that Mrs. Williams came and employed him to raise money for her husband; and he was not the less employed by her, because he was also employed by others to lay out money. He asks for an abstract, which is delivered to him with the title deeds on the part of Mrs. Williams. Looking to the character of mortgagor in which Mrs. Williams made the application, and to the character of mortgagee in the person of the proposed lender, it is clear that Church was acting as the attorney of both. That is a common practice in the country, and there is nothing unreasonable in supposing that such was the relation between these parties. If so, Church could not be allowed to disclose communications made to him in the capacity of attorney for the mortgagor. Suppose the mortgage had gone on to its completion; there would have been a bill delivered by Church to Mrs. Williams:

“Attending to your instructions to raise money for Mr. Williams.

“Looking at your abstract.

“Procuration money,” &c. &c.

Can any one say, that under such circumstances the relation of attorney and client would not have existed between them?

If so, it existed equally up to the time when the negotiation was broken off.

It would be of dangerous consequence, if, where the same professional man is resorted to by lender and borrower, he is permitted to disclose the communications *made to him on either side. I think, therefore, that it was not competent to Church to give in evidence a circumstance disclosed by Mrs. Williams upon the occasion in question, and that therefore there ought to be a new trial.

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PARK, J. :

I cannot distinguish this case from *Taylor v. Blacklow*, and the passage in Comyns's Digest cited in that case is in point. It is relied on here that Church was the attorney of the proposed lender ; but that is answered by *Taylor v. Blacklow*, where the CHIEF JUSTICE says, "there may be persons who have not sufficient firmness to take a decided course under such circumstances ; but if the defendant thought he had a conflicting duty towards his several employers, it would have been an easy course to deliver back the deeds to the plaintiff, and to consider his lips sealed with a sacred silence as to the whole of their contents." So here, though Church was concerned for the lender, he is not allowed to disclose communications made by the borrower.

VAUGHAN, J. :

I am of the same opinion. The simple question is, whether the relation of attorney and client existed between Church and Mrs. Williams ; and upon the note of Lord DENMAN I cannot doubt the fact. No doubt, the privilege is confined to the legal profession, as appears from the *Duchess of Kingston's* case (1) ; but it applies to all cases in which an attorney is consulted professionally ; and there can be no doubt Church was to assist professionally in raising the money for the applicant.

Rule to enter a verdict for plaintiff discharged.

Rule absolute for a new trial.

(1) Fourth day, 20th April, 1776 (20 State Trials, 574).

1837.
Jan. 18.

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PONTET, SURVIVING EXECUTOR OF JOSEPH GAILLARD,
v. THE BASINGSTOKE CANAL COMPANY (1).

(3 Bing. N. C. 433—438; S. C. 4 Scott, 182; 3 Hodges, 46; 6 L. J. (N. S.)
C. P. 177.)

A Canal Company were empowered by Act of Parliament to raise money on the security of the canal and dues, the creditors to have no priority over each other. By the form of deed given in the Act of Parliament authorising the undertaking, the canal and dues were assigned to the lenders as a security for the principal money lent, the interest on which was "to be paid half yearly:"

Held, that an action of covenant for payment of interest, did not lie against the Company on the deed.

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THE declaration stated, that defendants (the Company of Proprietors of the Basingstoke Canal Navigation), on the 26th of September, 1793, according to the statute in such case made and provided, made their deed poll, sealed with their common seal, and now shewn to the Court here, (the date whereof was the day and year aforesaid,) and thereby made known to all to whom those presents should come, that in pursuance and by virtue of an Act of Parliament made and passed in the 33rd year of the reign of Geo. III.—entitled "An Act for effectually carrying into execution an Act of *Parliament of the 18th year of the reign of his present Majesty, for making a navigable canal from the town of Basingstoke in the county of Southampton, &c." and also of an order made at a general assembly or meeting of the said Company of Proprietors, held on the 15th of April, 1793, and in consideration of the sum of 100*l.*, to them advanced and paid by Joseph Gaillard, the receipt whereof was thereby acknowledged, the said Company of Proprietors had granted and assigned, and by that present instrument or writing under their common seal, did grant and assign unto the said J. Gaillard, his executors, administrators, and assigns, all the said navigation and undertaking, and the rates or duties granted and made payable by the said Act of the 18th year of the reign of his Majesty, and all their property, estate, right, and interest therein; to hold the same unto the said J. Gaillard, his executors, administrators, and assigns, until the said sum of 100*l.*, together with interest

(1) See *Hopkins v. Worcester, &c. Canal Co.* (1868) L. R. 6 Eq. 437, 37 L. J. Ch. 729.—R. C.

for the same at the rate of 5*l.* per centum per annum, to commence from the 24th of June, then last past, and to be paid half yearly, that is to say, on the 25th of December and the 24th of June in every year, should be fully repaid and satisfied.

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After a second and third count upon two similar deeds, the plaintiff averred that after the making of the said deeds, the defendants did not keep their covenant in the same, in this, to wit, that the interest on the said sum was not paid according to the said deeds; and that, on the contrary thereof, afterwards, to wit, on the 25th of December, 1834, a large sum of money, to wit, the sum of 95*l.*, became and was due and in arrear for interest upon each of the said sums, for a large space of time, to wit, the space of 19 years, before then elapsed, contrary to the force and effect of the said several deeds, and the covenant in each contained: to the damage of the plaintiff, as such surviving executor of 500*l.*

Among other pleas, the defendants pleaded, as to the first count of the declaration, that the deed poll therein mentioned was made and executed by them the defendants, for the purpose of securing to the said J. Gaillard, therein named, the repayment of a certain sum of money, to wit, 100*l.* borrowed by them of him for the purpose specified in and by the said Act made and passed in the 33 Geo. III., and interest thereon; that the said deed poll was made and executed by the defendants, pursuant to the provisions in that Act contained; by reason whereof J. Gaillard became and was, and the plaintiff, as surviving executor as aforesaid, still is entitled to all the privileges and benefits of a claim or lien on the navigation and undertaking, rates and duties, mentioned in the said Act of the 18 Geo. III. That the defendants had in like manner borrowed from divers other persons, divers large sums of money, amounting in the whole to a large sum of money, to wit, the sum of 54,270*l.*, and had executed mortgages or assignments for securing the repayment of the same with interest, for the purposes of, and pursuant to, the said Act of 33 Geo. III. And the defendants averred that the said last-mentioned sum of money still remained due and unpaid; and that the said last-mentioned persons, their executors, administrators, and assigns, before and at the time of the

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commencement of this suit were, and still are entitled to a lien on the said navigation and undertaking, rates and duties, together with the plaintiff and executor, as aforesaid. That the whole assets and property of the defendants were insufficient to pay and satisfy the said sum of money, and interest in the deed poll in the first count mentioned, and the said other sums of moneys borrowed by the defendants, as in this plea mentioned, and interest thereon; and that if the plaintiff should succeed in obtaining a judgment in this suit against the defendants *he would thereby obtain a priority over the said other creditors of the defendants, contrary to the form of the statute in such case made and provided (1); and that, the defendants were ready to verify, &c.

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There were similar pleas to the other counts. Demurrer and joinder.

Barstow, for the plaintiff, being called on to support the declaration, contended that, though with respect to the principal money lent, the Company's deed poll only gave the testator a mortgage security on the property and profits of the canal, yet, with respect to the interest, the words "to be paid half yearly" constituted a covenant on the part of the proprietors to pay it, on which they were liable to an action at the suit of the plaintiff. No express form of words is necessary to raise a covenant: Com. Dig. Covenant A. *It is sufficient if the intention of the parties to bind themselves is made to appear; and the words "to be paid half-yearly" have no meaning unless they imply an

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(1) By the statute 33 Geo. III. c. xvi. s. 1, it is enacted, "That it shall be lawful for the said Company of Proprietors, and they are hereby empowered from time to time, by virtue of an order made at any general assembly or meeting of the said Company of Proprietors, to borrow and take up, at legal or less interest, any sum or sums of money upon the credit of the said undertaking, and the rates and duties granted and made payable by the said Act; and by writing under their common seal to mortgage

and assign over the said undertaking, and the said rates or duties, to the person or persons who shall advance or lend such money, or his or their trustee or trustees, as a security for the money so to be borrowed, together with interest for the same." And

By sect. 3. "That all persons to whom any such mortgages or assignments, or grants of annuity as aforesaid shall be made, or who shall be entitled to the money thereby secured, shall be creditors on the said rates or duties in equal degree one with

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engagement on the part of the Company to make the payment at that interval. In Roll. Abr. 518, 2 Bac. Abr. Covenant, 389, 6 Vin. Abr. 378, it is laid down : " If there are articles of agreement between A. and B. by which it is agreed, upon a marriage intended between A. and C., that all the stock of C. shall remain in the hands of B. till A. shall make a certain jointure to C., *ipso B. annuatim solvendo* to A. *interesse proinde secundum ratam* 8l. per centum &c. if B. does not pay the said interest, an action of covenant lies against him upon those words ; because every agreement by deed is a covenant ; otherwise A. could not have any remedy for his money."

TINDAL, Ch. J. :

If the declaration had been demurred to, we must have imported into it these Acts of Parliament which are declared public, and we should then have seen that this Company has no authority to borrow money except on the credit of the undertaking and the rates or duties. The third clause of the Act provides that "all persons to whom any such mortgages, or assignments, or grants of annuity as aforesaid shall be made, or who shall be entitled to the money thereby secured, shall be creditors on the said rates or duties in equal degree one with another, and no preference shall be given to any such creditors in respect to the priority of advancing their money, or the dates of their securities ; and that the interest of the money to be borrowed, and the annuities to be granted as aforesaid, shall from time to time be paid half yearly to the several persons entitled thereto, in preference to any interest or dividends due or payable by the said Company of Proprietors by virtue of the said recited Act : " *that means, that it shall be paid out of the rates or duties. For the last half century there have been Canal Acts

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another ; and no preference shall be given to any such creditors in respect to the priority of advancing their money or the dates of their securities ; and that the interest of the money to be borrowed, and the annuities to be granted as aforesaid,

shall from time to time be paid half yearly to the several persons entitled thereto, in preference to any interest or dividends due or payable by the said Company of Proprietors, by virtue of the said recited Act."

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proprietors for the interest of money advanced on the credit of the undertaking. It would be the ruin of undertakings of this sort if the proprietors were to be personally liable. Therefore when it is enacted "that it shall be lawful for the said Company of Proprietors, and they are hereby empowered from time to time, by virtue of an order made at any general assembly, or meeting of the said Company of Proprietors, to borrow and take up, at legal or less interest, any sum or sums of money upon the credit of the said undertaking and the rates or duties granted and made payable by the said Act, and by writing under their common seal to mortgage or assign over the said undertaking, and the said rates or duties to the person or persons who shall advance or lend such money, or his or their trustee or trustees, as a security for the money so to be borrowed, together with interest for the same," the terms of this contract are satisfied by giving the lenders of money a security on the undertaking, without allowing them to sue the corporation. Their remedy would be by entering on the property of the Company.

VAUGHAN, J. :

I am of the same opinion. The third section by enacting that all the creditors shall have an equal claim to the property and dues of the Company, imports that the Company was not to be subject to actions of this kind.

Judgment for the defendants (1).

(1) PARK, J. was absent on account of illness.

VAUGHAN *v.* MENLOVE (1).

(3 Bing. N. C. 468—477; S. C. 4 Scott, 244; 3 Hodges, 51; 6 L. J. (N. S.) C. P. 92; 1 Jur. 215; S. C. at Nisi Prius, 7 Car. & P. 525.)

1837.
Jan. 23.
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An action lies against a party for so negligently constructing a hay-rick on the extremity of his land, that in consequence of its spontaneous ignition, his neighbour's house is burnt down.

In questions of negligence or no negligence, the caution that a prudent man would have observed is the proper measure of the defendant's duty. It is not enough to say that he acted to the best of his own judgment.

THE declaration stated, that before and at the time of the grievance and injury, hereinafter mentioned, certain premises, to wit, two cottages with the appurtenances situate in the county of Salop, were respectively in the respective possessions and occupations of certain persons as tenants thereof to the plaintiff, to wit, one thereof in the possession and occupation of one Thomas Ruscoe as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff, and the other thereof in the possession and occupation of one Thomas Bickley as tenant thereof to the plaintiff, the reversion of and in the same with the appurtenances then belonging to the plaintiff: that the defendant was then possessed of a certain close near to the said cottages, and of certain buildings of wood and thatch, also near to the said cottages; and that the defendant was then also possessed of a certain rick or stack of hay before then heaped, stacked, or put together, and then standing, and being in and upon the said close of the defendant. That on the 1st of August, 1835, while the said cottages so were in the occupation of the said tenants, and while the reversion thereof respectively so belonged to the plaintiff as aforesaid, the said rick or stack of hay of the defendant was liable and likely to ignite, take fire, and break out into a flame, and there had appeared, and were just grounds to apprehend and believe that the same would ignite, take fire, and break out into a flame;

(1) Among cases illustrating the modern developments of responsibility in more or less similar circumstances, the reader may refer to *Whiteley v. Pepper* (1877) 2 Q. B. D. 276, 46 L. J. Q. B. 436; *Hurdaker*

v. Idle District Council [1896] 1 Q. B. 335, 65 L. J. Q. B. 363, C. A.; *Penny v. Wimbledon Urban Council*, '98. 2 Q. B. 212, 67 L. J. Q. B. 754; *affd.* [1899] 2 Q. B. 72, C. A.—R. C.

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and by reason of such liability, and of the state and condition of the said rick or stack of hay, the same then was and continued dangerous to the said cottages; of which said several premises *the defendant then had notice: yet the defendant well knowing the premises, but not regarding his duty in that behalf, on &c., and from thence until and upon a certain day, to wit, on &c. wrongfully, negligently, and improperly, kept and continued the said rick or stack of hay, so likely and liable to ignite and take fire, and in a state and condition dangerous to the said cottages, although he could, and might, and ought to have removed and altered the same, so as to prevent the same from being and continuing so dangerous as aforesaid; and by reason thereof the said cottages for a long time, to wit, during all the time aforesaid, were in great danger of being consumed by fire. That by reason of the premises, and of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack, in a state or condition so dangerous as aforesaid, and so liable and likely to ignite and take fire and break out into flame, on &c., and while the said cottages so were occupied as aforesaid, and the reversion thereof respectively so belonged to the plaintiff, the said rick or stack of hay of the defendant, standing in the close of the defendant, and near the said cottages, did ignite, take fire, and break out into flame, and by fire and flame thence issuing and arising, the said buildings of the defendant so being of wood and thatch as aforesaid, and so being near to the said rick or stack as aforesaid, were set on fire; and thereby and by reason of the carelessness, negligence, and improper conduct of the defendant, in so keeping and continuing the said rick or stack in such condition as aforesaid, fire and flame so occasioned as aforesaid by the igniting and breaking out into flame, of the said rick or stack, was thereupon then communicated unto the said cottages in which the plaintiff was interested as aforesaid, which were thereby then respectively set on fire, and then, to wit on &c., by

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reason of such *carelessness, negligence, and improper conduct of the defendant in so continuing the said rick or stack in such a dangerous condition as aforesaid, in manner aforesaid, were consumed, damaged, and wholly destroyed, the cottages being

of great value, to wit, the value of 500*l*. And by means of the premises, the plaintiff was greatly and permanently injured in his said reversionary estate and interest of and in each of them : to the plaintiff's damage of 500*l*.

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The defendant pleaded, first, not guilty. Secondly, that the said rick or stack of hay was not likely to ignite, take fire, and break out into flame ; nor was the same by reason of such liability, and of the state or condition of the said rick and stack of hay, dangerous to the said cottages ; nor had the defendant notice of the said premises, in manner and form as the plaintiff had in and by his declaration in that behalf alleged. Thirdly, that the defendant did not, well knowing the premises in the declaration in that behalf mentioned, wrongfully, negligently, or improperly, keep or continue the said rick or stack of hay, in a state and condition dangerous to the said cottages. Fourthly, that the said rick or stack of hay, did not by reason of the carelessness, negligence and improper conduct of the defendant in that behalf, ignite, take fire, and break out into flame. And fifthly, that the said cottages were not consumed, damaged, and destroyed by reason of the carelessness, negligence, and improper conduct of the defendant.

At the trial it appeared that the rick in question had been made by the defendant near the boundary of his own premises ; that the hay was in such a state when put together, as to give rise to discussions on the probability of fire : that though there were conflicting opinions on the subject, yet during a period of five weeks, the defendant was repeatedly warned of his *peril ; that his stock was insured ; and that upon one occasion, being advised to take the rick down to avoid all danger, he said " he would chance it." He made an aperture or chimney through the rick ; but in spite, or perhaps in consequence of this precaution, the rick at length burst into flames from the spontaneous heating of its materials ; the flames communicated to the defendant's barn and stables, and thence to the plaintiff's cottages, which were entirely destroyed.

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PATTERSON, J. before whom the cause was tried, told the jury that the question for them to consider, was, whether the fire had been occasioned by gross negligence on the part of the

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defendant ; adding, that he was bound to proceed with such reasonable caution as a prudent man would have exercised under such circumstances.

A verdict having been found for the plaintiff, a rule *nisi* for a new trial was obtained, on the ground that the jury should have been directed to consider, not, whether the defendant had been guilty of gross negligence with reference to the standard of ordinary prudence, a standard too uncertain to afford any criterion ; but whether he had acted *bona fide* to the best of his judgment ; if he had, he ought not to be responsible for the misfortune of not possessing the highest order of intelligence. The action under such circumstances, was of the first impression.

Talfourd, Serjt. and *Whateley*, shewed cause :

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The pleas having expressly raised issues on the negligence of the defendant, the learned Judge could not do otherwise than leave that question to the jury. The declaration alleges that the defendant knew of the dangerous state of the rick, and yet negligently and improperly allowed it to stand. The plea of not guilty, therefore, puts in issue the *scienter*, it being of the substance *of the issue : *Thomas v. Morgan* (1). And the action, though new in specie, is founded on a principle fully established, that a man must so use his own property as not to injure that of others. On the same circuit a defendant was sued a few years ago, for burning weeds so near the extremity of his own land as to set fire to and destroy his neighbours' wood. The plaintiff recovered damages, and no motion was made to set aside the verdict. Then, there were no means of estimating the defendant's negligence, except by taking as a standard, the conduct of a man of ordinary prudence : that has been the rule always laid down, and there is no other that would not be open to much greater uncertainties.

R. V. Richards, in support of the rule :

First, there was no duty imposed on the defendant, as there is on carriers or other bailees, under an implied contract, to be responsible for the exercise of any given degree of prudence :

(1) 41 R. R. 782 (2 C. M. & R. 496).

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the defendant had a right to place his stack as near to the extremity of his own land as he pleased: *Wyatt v. Harrison* (1): under that right, and subject to no contract, he can only be called on to act *bonâ fide* to the best of his judgment: if he has done that, it is a contradiction in terms, to inquire whether or not he has been guilty of gross negligence. At all events what would have been gross negligence ought to be estimated by the faculties of the individual, and not by those of other men. The measure of prudence varies so with the varying faculties of men, that it is impossible to say what is gross negligence with reference to the standard of what is called ordinary prudence. In *Crook v. Jadis* (2), PATTESON, J. says, "I never could understand *what is meant by parties taking a bill under circumstances which ought to have excited the suspicion of a prudent man:" and TAUNTON, J., "I cannot estimate the degree of care which a prudent man should take."

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In *Foster v. Pearson* too (3), it appears that the rule which called on persons taking negotiable instruments to act with the circumspection of a prudent man, has at length been abandoned. There, the Judge left it to the jury to say whether the holder of bills took them with due care and caution and in the ordinary course of business; and upon a motion to set aside a verdict for the plaintiff, the Court said: "Of the mode in which the question was left, the defendant has certainly no right to complain; but, if the verdict had been in his favour, it would have become necessary to consider whether the learned Judge was correct in adopting the rule first laid down by the Court of Common Pleas, in the case of *Snow v. Peacock* (4), and which was founded upon the *dicta*, rather than the decision, of the Judges of the King's Bench in the case of *Gill v. Cubitt* (5); more especially since the opinion of the latter Court has been so strongly intimated in the late cases of *Crook v. Jadis* (2) and *Backhouse v. Harrison* (6). The rule of law was long considered as being firmly established, that the holder of bills of exchange

(1) 37 R. R. 566 (3 B. & Ad. 871).

(2) 5 B. & Ad. 909, 910.

(3) 40 R. R. 744 (1 C. M. & R. 849, 855).

(4) 3 Bing. 406; 11 Moore, 286.

(5) 3 B. & C. 466; 5 D. & R. 324

[overruled: see *Bank of Bengal v. Fagan* (1849) 7 Moo. P. C. 61].

(6) 5 B. & Ad. 1098; 3 N. & M. 188.

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indorsed in blank or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a *bouâ fide* holder for value ; and it may well be questioned whether it has been wisely departed from in the case to which reference has been made, and other subsequent cases in which care and caution in the taker of such securities has been treated as essential to the validity of his title, besides, and independently of, honesty of purpose."

[474] TINDAL, Ch. J. :

I agree that this is a case *prime impressionis* ; but I feel no difficulty in applying to it the principles of law as laid down in other cases of a similar kind. Undoubtedly this is not a case of contract, such as a bailment or the like where the bailee is responsible in consequence of the remuneration he is to receive ; but there is a rule of law which says you must so enjoy your own property as not to injure that of another ; and according to that rule the defendant is liable for the consequence of his own neglect : and though the defendant did not himself light the fire, yet mediately, he is as much the cause of it as if he had himself put a candle to the rick ; for it is well known that hay will ferment and take fire if it be not carefully stacked. It has been decided that if an occupier burns weeds so near the boundary of his own land that damage ensues to the property of his neighbour, he is liable to an action for the amount of injury done, unless the accident were occasioned by a sudden blast which he could not foresee : *Turbervill v. Stamp* (1). But put the case of a chemist making experiments with ingredients, singly innocent, but when combined, liable to ignite ; if he leaves them together, and injury is thereby occasioned to the property of his neighbour, can any one doubt that an action on the case would lie ?

It is contended, however, that the learned Judge was wrong in leaving this to the jury as a case of gross negligence, and that the question of negligence was so mixed up with reference to what would be the conduct of a man of ordinary prudence that the jury might have thought the latter the rule by which they were to decide ; that such a rule would be too uncertain to

(1) 1 Salk. 13.

act upon ; and that the question ought to have been whether the defendant had acted honestly and *bonâ fide* to the best of his own judgment. That, *however, would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various : and though it has been urged that the care which a prudent man would take, is not an intelligible proposition as a rule of law, yet such has always been the rule adopted in cases of bailment, as laid down in *Coggs v. Bernard* (1). Though in some cases a greater degree of care is exacted than in others, yet in “the second sort of bailment, viz., *commodatum* or lending gratis, the borrower is bound to the strictest care and diligence to keep the goods so as to restore them back again to the lender ; because the bailee has a benefit by the use of them, so as if the bailee be guilty of the least neglect he will be answerable ; as if a man should lend another a horse to go westward, or for a month ; if the bailee put this horse in his stable, and he were stolen from thence, the bailee shall not be answerable for him : but if he or his servant leave the house or stable doors open, and the thieves take the opportunity of that, and steal the horse, he will be chargeable, because the neglect gave the thieves the occasion to steal the horse.” The care taken by a prudent man has always been the rule laid down ; and as to the supposed difficulty of applying it, a jury has always been able to say, whether, taking that rule as their guide, there has been negligence on the occasion in question.

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Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe. *That was in substance the criterion presented to the jury in this case, and therefore the present rule must be discharged.

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PARK, J. :

I entirely concur in what has fallen from his Lordship.

(1) 2 Ld. Ray. 909.

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Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others. In *Turbervill v. Stamp* (1), which was “an action on the case upon the custom of the realm, quare negligenter custodivit ignem suum in clauso suo, ita quod per flammam blada Quer. in quodam clauso ipsius Quer. combusta fuerunt; after verdict pro Quer. it was objected that the custom extended only to fire in his house, or curtilage (like goods of guests) which were in his power: *Non alloc.* For the fire in his field was his fire as well as that in his house; he made it, and must see that it did no harm, and must answer the damage if it did. Every man must use his own so as not to hurt another: but if a sudden storm had risen which he could not stop, it was matter of evidence, and he should have shewn it. And HOLT, and ROKESBY, and EYRE were against the opinion of TURTON, who went upon the difference between fire in a house which was in a man’s custody and power, and fire in a field which was not properly so; and that it would discourage husbandry, it being usual for farmers to burn stubble, &c. But the plaintiff had judgment according to the opinion of the other three.” That case, in its principles, applies closely to the present.

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As to the direction of the learned Judge, it was perfectly correct. Under the circumstances of the case it was proper to leave it to the jury whether with reference to the caution which would have been observed by *a man of ordinary prudence, the defendant had not been guilty of gross negligence. After he had been warned repeatedly during five weeks as to the consequences likely to happen, there is no colour for altering the verdict, unless it were to increase the damages.

GASELEE, J. concurred in discharging the rule.

VAUGHAN, J. :

The principle on which this action proceeds is by no means new. It has been urged that the defendant in such a case takes no duty on himself; but I do not agree in that position: every

one takes upon himself the duty of so dealing with his own property as not to injure the property of others. It was, if any thing, too favourable to the defendant to leave it to the jury whether he had been guilty of gross negligence; for when the defendant upon being warned as to the consequences likely to ensue from the condition of the rick, said, "he would chance it," it was manifest he adverted to his interest in the insurance office. The conduct of a prudent man has always been the criterion for the jury in such cases: but it is by no means confined to them. In insurance cases, where a captain has sold his vessel after damage too extensive for repairs, the question has always been, whether he has pursued the course which a prudent man would have pursued under the same circumstances. Here, there was not a single witness whose testimony did not go to establish gross negligence in the defendant. He had repeated warnings of what was likely to occur, and the whole calamity was occasioned by his procrastination.

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Rule discharged.

WILLIAM RICHARDS AND PEGGY HIS WIFE,
EXECUTRIX OF PEGGY MANLEY, DECEASED, v. J.
M. BROWNE, EXECUTOR OF DENNIS WITHERS
WADE, DECEASED, EXECUTRIX OF W. B. WADE,
DECEASED.

1837.
Jan. 25.
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(3 Bing. N. C. 493—500; S. C. 4 Scott, 262; 3 Hodges, 27; 6 L. J. (N. S.) C. P. 95.)

The attorney of a creditor of testator wrote as follows to the attorney of his executrix:

"My clients do not claim from W. payment of this money as executrix of W. B. W., but they claim from her individually, she having become liable, by payment of interest from time to time, to this debt:"

Held to be no waiver of the creditor's right to sue W. as executrix, nor any excuse to her for discharging legacies before debts.

2. Where an executrix has a life estate in a chattel under a bequest, her taking possession of the chattel is no assent to a further bequest thereof in remainder.

THE plaintiffs declared on a promissory note, bearing date the 12th of April, 1816, by which William Barry Wade, deceased,

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promised to pay Peggy Manley, deceased, 100*l.*, with lawful interest for the same: also on an account stated between Peggy Manley, deceased, and Dennis Withers Wade, as executrix of W. B. Wade.

The defendant pleaded, first, that at the time of the commencement of this suit, and ever since, he had had no goods or chattels of W. B. Wade, deceased, at the time of his death, in the hands of the defendant as executor as aforesaid, or otherwise, to be administered; and also, that at the time of the commencement of the suit, and ever since, he had had no goods or chattels of the said D. W. Wade, deceased, at the time of her death, in the hands of the defendant as executor as aforesaid, to be administered. Secondly, no effects of the said W. B. Wade. Thirdly, payment of several specialty debts due from D. W. Wade; and allegation of others outstanding. And, lastly, full administration of all the effects of D. W. Wade, deceased.

The plaintiffs replied to the first and last pleas, that, at the commencement of this suit, the defendant had in his hands effects of W. B. Wade, deceased, at the time of his death, to be administered.

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At the trial before Bolland, B., Taunton Spring Assizes, 1836, the following facts were proved or admitted :

The plaintiff's wife was executrix of Peggy Manley, deceased. The plaintiffs sued on a promissory note for 100*l.*, given by W. B. Wade to Peggy Manley in 1816, the interest on which had been regularly paid by W. B. Wade during his life, and by D. W. Wade after his death, up to the year 1831. W. B. Wade died in 1825, bequeathing to D. W. Wade his household furniture for her life; and after her death, to Sarah Chapple.

Dennis Withers Wade died in 1832, leaving defendant her executor.

In July, 1831, James Waldron, the plaintiff's then attorney, wrote to the defendant and his brother, on the subject of the promissory note, as follows :

“ Richards v. Wade. As I am apprehensive you have in some measure misunderstood my clients' demand, I write you by return of post. My clients do not claim from Miss Wade payment of

this money as executrix or administratrix of W. B. Wade, Esq.; but they claim from Miss Wade individually, Miss Wade having become liable, from payment of interest from time to time, to this debt.”

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Waldron was not called as a witness; and there was no evidence of his authority to write the letter, except that he at that time acted as the plaintiffs' attorney. The letter was not stamped; nor was there any evidence of payment made in consequence thereof.

The plaintiffs had previously, in May, 1881, given the defendant and his partner, who were the attorneys of Miss Wade, the following receipt for one year's interest of the sum claimed in this action:

“1881, May 24. Received of Messrs. R. and M. Browne, by payment of Mr. James Waldron, the sum of 5*l.*, being for one year's interest of 100*l.* due from Miss Dennis Withers Wade to us on the 12th of April last.”

Upon the death of W. B. Wade, Miss D. W. Wade took possession of the furniture bequeathed to her for life; and upon her death S. Chapple, with the consent of the defendant, took possession of the same furniture. The plaintiffs proved that that furniture was now in the hands of S. Chapple, and that it was worth 200*l.*

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A verdict was thereupon found for the plaintiffs, subject to the opinion of the Court on a special case, stating the above-mentioned facts.

The question for the opinion of the Court was, whether, under the foregoing circumstances, the defendant was liable to pay the promissory note on which the plaintiffs sued.

Bere, for the plaintiffs:

As the making of the promissory note by the testator, and the sufficiency of assets, are undisputed in the case, the defendant, as executor of Miss Wade, is liable to the plaintiff, unless the letter written by Waldron operated as a discharge. Now, if the letter had been written to Miss Wade, it would not have discharged her; and her executor cannot stand in a better position.

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It would not have discharged her, because it is unintelligible, and contains no consideration for such discharge. Miss Wade, by assenting to the bequest of furniture before she paid the testator's debts, was guilty of a *derastavit*, and already liable to the plaintiffs as executrix, and *de bonis propriis*: Williams's Law of Executors, 880. There was no motive, therefore, for the plaintiffs releasing Miss Wade's executor from her liability as executrix: the letter contains no consideration for such release; nor is there any evidence that Miss Wade assented to the substituted liability. If, however, the letter can be taken to have substituted a personal for a representative liability, it is a contract, and ought to have been stamped before it *was received in evidence. It may be contended for the defendant that the letter amounted to an authority to the defendant to assent to the legacy to Miss Chapple; if so, it ought to have been pleaded as such: it is no evidence to shew that the defendant has fully administered the testator's effects, or that he has no assets; but only that he was authorised to administer in an irregular order. The defendant ought not to have assented to the legacy within a twelvemonth, and without full inquiry: *Davis v. Blackwell* (1), *Chelsea Waterworks Company v. Cowper* (2).

Erle, for the defendant :

Waldron's letter was, in effect, an authority to the defendant to make over the bequest to Miss Chapple, after which he would not have been justified in withholding it. If Miss Chapple had sued the defendant for the furniture in trover, and the defendant had pleaded that he withheld it to discharge the promissory note due to the plaintiffs, Miss Chapple, upon the production of Waldron's letter, must have obtained a verdict; for by that letter it would have appeared that the plaintiffs had renounced all claim on the assets of W. B. Wade. As against the plaintiffs, therefore, the defendant is entitled to say that he has fully administered, and that he has no effects of W. B. Wade. Waldron's letter was evidence to support the pleas of *Plene administravit* and *Nulla bona*, and no other plea was requisite.

Then, as the letter was a mere authority to warrant the

(1) 35 R. R. 503 (9 Bing. 5).

(2) 1 Esp. 275.

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defendant's course of distribution, and not a contract, no consideration was necessary, and no stamp: whether it was given advisedly, or unadvisedly, it was the act of the plaintiffs by their attorney, never disputed or revoked; and it would be great injustice, that the plaintiffs, *after misleading the defendant, should call on him now to indemnify them against the consequences of their own error or *laches*. In *Skyring v. Greenwood* (1), the defendants, army agents, had orders in 1816 to stop certain allowances to officers; they continued, however, to give Major Skyring credit in account for the allowances till 1821; when, for the first time, they apprized him that the allowances had been stopped in 1816, and refused to pay him the money they had so allowed in account. They were held liable, however, in an action for money had and received to Major Skyring's use; and Lord TENTERDEN said, "The particular fact, in this case, upon which my judgment proceeds is, that the defendants were informed in 1816 that the Board of Ordnance would not allow those payments to persons in the situation of Major Skyring; but they never communicated to him that fact until 1821, having in the mean time given him credit for these allowances. I think it was their duty to communicate to the deceased the information which they had received from the Board of Ordnance: but they forbore to do so; and they suffered him to suppose, during all the intervening time, that he was entitled to the increased allowances. It is of great importance to any man, and certainly not less to military men than others, that they should not be led to suppose that their annual income is greater than it really is. Every prudent man accommodates his mode of living to what he supposes to be his income; it therefore works a great prejudice to any man, if, after having had credit given him in account for certain sums, and having been allowed to draw on his agent on the faith that those sums belonged to him, he may be called upon to pay them back. Here, the defendants have not merely made an error in account, but they have been guilty of a breach of duty, by not communicating *to Major Skyring the instruction they received from the Board of

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(1) 28 R. R. 264 (4 B. & C. 281).

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Ordinance in 1816; and I think, therefore, that justice requires that they shall not be permitted to recover back, or retain by way of set-off, the money which they had once allowed him in account."

In that case, there was no consideration for the sums allowed in account by the defendants to Major Skyring; but if they were not permitted to retract the allowance after they had misled Major Skyring into a belief that he was entitled to receive it, why should the plaintiffs here be permitted to retract the allowance of the bequest of Miss Chapple, to which they have misled the defendant by the letter of their own attorney? *Chelsea Waterworks Company v. Cowper* (1), *Brooking v. Jennings* (2), *Harman v. Harman* (3), and *Davis v. Blackwell*, are all authorities to shew that an executor cannot be sued on a *devastavit* by a creditor, who, either by *laches* or consent, has misled the executor into a distribution of assets out of the regular course. Here, the plaintiffs were guilty of gross *laches* in not enforcing payment of the note during the long interval between the death of W. B. Wade, in 1825, and of his executrix, in 1832.

But, secondly, no assets came to the defendant's hands; for Miss Wade, by taking possession of the furniture under the bequest to her for life, assented to the residuary bequest to S. Chapple; insomuch that, after Miss Wade's decease, S. Chapple might have sued for the furniture in trover: for an assent to a particular estate in a bequest, is an assent to the bequest as to those in remainder: *Doe d. Lord Saye and Sele v. Guy* (4), *Paramour v. Yardley* (5), 1 P. Wms. 12. The *devastavit*, therefore, if any, was committed by Miss Wade, and not by the defendant.

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Bere, in reply :

As to the last ground of defence, since Miss Wade might have taken the furniture, and have held it rightfully, in her capacity of executrix, till the amount of assets should have shewn whether

(1) 1 Esp. 275.

(2) 1 Mod. 174.

(3) 3 Mod. 115.

(4) 6 R. R. 563 (3 East, 120).

(5) Plowd. 539.

the residuary legatee would be entitled; or might have taken it wrongfully, as legatee; she must be holden to have taken it rightfully, and therefore not to have assented to the bequest.

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With respect to Waldron's letter, if it is to have the effect ascribed to it by the defendant, he should have pleaded that he made over the furniture to the legatee, without notice of the debt, and have relied on the letter as proof of want of notice.

TINDAL, Ch. J. :

The defendant has set up two objections to the plaintiffs' right to recover: first, that they have misled the defendant in his distribution of assets, by their own *laches* and the letter of their attorney; in consequence of which the defendant has been led to administer the assets in a way he would not otherwise have done: secondly, that the *devastavit*, if any, was committed by the executrix of W. B. Wade; and that the defendant, having no assets, is not liable.

On the first point, I admit, that if, in the distribution of assets, a creditor does mislead an executor, either by *laches* or express authority, so as thereby to induce the executor to pursue a course he would not otherwise have pursued, the creditor is precluded from complaining of an insufficiency of assets (1). But on the facts of this case, I think the defendant is not within the reach of that principle; for Waldron's letter, although on the particular occasion it makes claim on Miss Wade because she had recognised the debt by payment of interest, does not renounce the right to claim against the assets of her testator, and contains nothing incompatible with an intention to resort to that right if the claim against *Miss Wade, in her personal capacity, should be unavailing. The construction which the defendant seeks to put on the letter would go to deprive the plaintiffs of any remedy. If they sue Miss Wade in her individual capacity, it is said she has left no assets; if they sue her in her representative capacity, it is said the plaintiffs have abandoned their claim by authorising

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(1) See this passage of the judgment cited by BLACKBURN, J. in *Jewsbury v. Mummery* (1872) L. R. 8 C. P. 56, 62, 42 L. J. C. P. 22, 24;

and by CHITTY, J. in *In re Birch, Roe v. Birch* (1884) 27 Ch. D. 622, 627, 54 L. J. Ch. 119, 121.—R. C.

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BROWNE.

the payment of legacies and by *laches*. I think the letter in question amounts to no such authority; and as to the supposed *laches*, it is answered by the demand and receipt of interest on the debt during the whole period of Miss Wade's life.

Upon the second point, it does not appear that Miss Wade has been guilty of any *deceit*; for, though an assent to a particular estate in a property bequeathed is an assent to the estate in remainder also, yet, as Miss Wade might have taken the furniture either as executrix or as legatee, and as there is no reason for presuming she took it on the bad title of a legatee while debts remained unpaid, when she might have taken it on a good one as executrix, it must be intended that she held it as executrix. The second point, therefore, fails as well as the first; and our judgment must be for the plaintiffs.

PARK, J. concurred.

VAUGHAN, J. :

The defendant assented to Miss Chapple's taking the furniture immediately on the decease of Miss Wade; there was therefore, according to all the cases, a very precipitate administration of the assets, from the consequences of which the defendant is by no means released by the contents of Waldron's letter.

Judgment for plaintiffs.

1837.
Jan. 28.

[506]

SOUTH v. FINCH.

(3 Bing. N. C. 506—507; S. C. 4 Scott, 293; 1 Jur. 167.)

An agreement for the sale of goods and goodwill for 60*l.*: Held, to require a stamp.

THIS was an action to recover money due under the following agreement: "William Finch agrees to take two flies of John South at 60*l.*; 5*l.* to be paid down, and the remainder at three months; harness and goodwill included."

The agreement was not stamped; and it appearing at the trial that the plaintiff, at the time of the sale, carried on the business of letting out flies for hire, the goodwill of which business was sold as well as the flies, it was objected that, without a

stamp, the agreement could not be received in evidence, the exception in the Stamp Act (1) applying to an agreement for the sale of goods only.

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A verdict, however, was taken for the plaintiff, with leave for the defendant to move to enter a nonsuit instead.

Petersdorff having obtained a rule *nisi* accordingly,

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Busby shewed cause :

This was an agreement for the sale of goods only. Goodwill has no meaning in law, and cannot form the subject of a legal transfer : at all events, to render the agreement subject to a stamp, the goodwill ought to be of the value of 20*l.* Here, it appears that the flies were sold for 60*l.*, and the goodwill and harness were thrown into the bargain. The flies were the principal object of transfer ; and if the principal object did not require a stamp, it will not be rendered necessary by collateral matters. Thus in *Marson v. Short* (2), an agreement for the sale of an undivided moiety of a horse was held an agreement for the sale of goods within the exception of the Stamp Act, notwithstanding it contained a collateral stipulation that the horse should go to Newcastle to be entered for the handicap and silver cup.

At all events, it lay on the party raising the objection to support it, by shewing that the goodwill was worth 20*l.* : per PARKE, J. in *Rex v. Enderby* (3).

TINIAL, Ch. J. :

I feel great difficulty, but am unwilling to lay down a rule in a case where so small an amount is in dispute. But suppose a sale of brewing apparatus for 10,000*l.*, with the goodwill of the concern ; would any one say that that was a mere sale of goods ?

The case stood over with a view to a compromise ; but the parties being unable to agree,

(1) See now the Stamp Act, 1891, 54 & 55 Vict. c. 39. Schedule "Agreement," Exemption (3), which is identical with the exemption in the

Act of 1815 (55 Geo. III. c. 134, since repealed.—R. C.

(2) 42 R. R. 544 (2 Bing. N. C. 118).

(3) 2 B. & Ad. 205.

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The COURT now said the objection must prevail; but, instead of acceding to the application for a nonsuit, ordered a new trial, to give the plaintiff the opportunity of procuring a stamp.

Rule absolute for a new trial.

1837.
Jan. 30.

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WILKINSON v. HALL AND ANOTHER (1).

(3 Bing. N. C. 508—534; S. C. 4 Scott, 301; 3 Hodges, 56; 6 L. J. (N. S.) C. P. 82.)

An allegation that defendant held premises as tenant for a term of years, from year to year, is not made out by proof that he held by the quarter.

Plaintiff mortgaged land in fee, with a proviso for redemption on payment of principal in June, 1833; but it was agreed that the mortgagee should not call in the principal till 1840, if interest were regularly paid in the mean time; and that the mortgagor should hold the premises and take the rents, issues, and profits for his own use, till default should be made in the payment of principal and interest as aforesaid: Held, that this operated as a redemise to the mortgagor till 1840.

THIS was an action of debt upon the statute 4 Geo. II. c. 28, s. 1, brought by the plaintiff, who claimed as one of two tenants in common in fee of a wharf and warehouse, called Botolph Wharf, or Botolph Quay, in the city of London, against the defendants, as tenants of same premises, to recover double the yearly value of one undivided moiety of the same premises, which it was alleged the defendants had wrongfully held over after the service upon them of notice to quit and demand of possession.

[The effect of the pleadings is sufficiently stated in the judgment.]

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At the trial before Tindal, Ch. J. at the London adjourned sittings after Trinity Term, 1835, the jury found the single yearly value of the entire premises to be 1,341*l.*, which finding as to the value was to be binding on the parties; in other respects, the jury, by leave of the learned Judge and with the consent of the defendants, found a verdict *pro formá* for the plaintiff, subject to the opinion of this Court on the following case:

(1) *Doe v. Day* (1841) 2 Q. B. 147, 153.

On the 12th of June, 1832, the premises in question, consisting of a wharf or quay, warehouses, and buildings, called Botolph Wharf or Botolph Quay, and situate between London Bridge and the Tower of London, then belonging to his Majesty, and being then vested in the Lords Commissioners of his Majesty's Treasury, in trust for his Majesty, or in the secretary for the time being to the said Commissioners, for the use and service of his Majesty's Customs, the defendants entered into the following agreement :

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That they should become tenants of Botolph Wharf at 375*l.* a quarter, the tenancy to commence on Thursday the 14th of June, they paying a quarter's rent on that day. That they should give security, to be approved of by the Commissioners of Customs, to pay one quarter's rent in advance as long as they should continue tenants. That they should also give security to account for and pay over to the Commissioners of Customs, for the benefit of the assignees, such sums as they might receive for rent for goods prior to the 14th of June, immediately upon being required so to do.

The above agreement was signed by W. J. Hall, as agent for and on behalf of the defendants, and by J. G. Walford, as solicitor for the Commissioners of Customs and agent for and on behalf of their secretary for the time being.

On the 18th of June, 1832, the defendants, with one Lawrence Thompson as their surety, entered into a bond for 700*l.*, subject to the following conditions :

Whereas the above bounden W. Hall and T. S. Hall have this day become tenants to Charles Andrew Scovell, Esq., Secretary to the Commissioners of Customs, in trust for his Majesty, of certain premises situate in Thames Street, called and known by the name of Botolph Wharf, at the rent of 375*l.* a quarter ; and whereas, the said W. Hall and T. S. Hall have this day paid to the *said C. A. Scovell, in trust for his Majesty, the sum of 375*l.* for the first quarter's rent, and have agreed to pay the said sum of 375*l.* on or before the first day of every quarter during which they hold the said premises ; and whereas also there are certain sums due and payable for warehouse rent from certain parties in respect of goods bonded and warehoused at the said premises ; now the condition of this obligation is such, that if the said

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W. Hall and T. S. Hall shall well and truly pay to the said C. A. Scovell or his successors the said sum of 375*l.* on or before the first day of every quarter during which they hold the said premises, and shall at all times well and truly account to the said C. A. Scovell or to such person as he shall appoint for that purpose, for all sums received by them or any of them, due and payable on account of warehouse rent as aforesaid; and shall permit and suffer the said C. A. Scovell, or any person appointed by him, to inspect all books, papers, and writings in their or any of their custody relating to such last-mentioned sums; then this obligation to be void, otherwise to remain in full force and virtue.

By indentures of lease and release bearing date the 2nd and 3rd of December, 1833, the premises called Botolph Wharf were conveyed by the Lords of the Treasury and the Commissioners and Secretary of the Customs, to the plaintiff and to his partner William Stennett, their heirs and assigns, to the uses therein declared; viz., as to one moiety, to such uses and upon such trusts as the plaintiff should by deed or deeds direct, limit, or appoint, and in default thereof, or if incomplete, to the use of the plaintiff and his assigns for life, remainder to one J. K. Kinsman, his executors, administrators, and assigns during the life of the plaintiff, in trust for the plaintiff; remainder to the use of the plaintiff, his heirs and assigns, for ever. Similar uses were limited *and declared as to the other moiety in favour of W. Stennett.

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By certain indentures of lease, appointment, and release, bearing date respectively the 4th and 5th of December, 1833, the plaintiff and W. Stennett did, in consideration of 13,000*l.*, direct, limit, and appoint, that from and immediately after the execution thereof, the undivided moiety of each of them in the above mentioned messuages and premises should remain and be to the use of Wynn Ellis, Esq., his heirs and assigns, for ever; (subject to a proviso for redemption therein-after contained on payment of the sum of 13,000*l.*, with interest, on the 5th of June then next). It was by the same indenture further provided, declared, and agreed, that the said W. Ellis should not be entitled to call in the principal money by him advanced upon the

said mortgage before the 5th of December, 1840, if the interest payable by the mortgagors in respect of such principal money was in the meantime regularly paid according to the terms of the said deed.

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In the said deed were also the following clauses or provisions : That if the said sum of 13,000/., or the interest thereof, or any part thereof respectively, should not be paid conformably to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of that indenture, then and in such case it should and might be lawful for the said W. Ellis, his heirs and assigns, at any time or times thereafter, into or upon the said wharf, quay, and hereditaments thereby appointed and released, or intended so to be, to enter, and the same from time to time peaceably and quietly to have, hold, occupy, possess and enjoy, and receive and take the rents, issues, and profits thereof, without any let, suit, trouble, denial, interruption, or disturbance whatsoever of or from or by the said T. Wilkinson *and W. Stennett respectively, or their respective heirs or assigns, or any person or persons whomsoever having or lawfully or equitably claiming, or who should or might have or lawfully or equitably claim, any estate, right, title, interest, or inheritance in, to, or out of the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, or any part or parts thereof : and that, free and clear, &c. : Provided always, and it was thereby further agreed and declared between and by the parties to the said indenture, that it should and might be lawful for the said T. Wilkinson and W. Stennett respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use, until default should be made in payment of the said sum of 13,000/., or the interest thereof, or any part thereof respectively, contrary to the aforesaid provisos or agreements for payment of the same, and the true intent and meaning of the said indenture, without any let, suit, trouble, interruption or disturbance whatsoever of or from or by the said W. Ellis, his

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On the 12th of September, 1893, an order, to the following effect, was signed with the initials of Edward Stewart, who was

acting chairman of the Board of Customs at that time: "The solicitor having laid before the Board the form of a notice to be given *pursuant to the Treasury order of the 11th instant, to Messrs. Hall to quit Botolph Wharf, in consequence of Mr. Wilkinson having agreed to purchase the same, it was resolved, That the form of notice is approved, and the assistant secretary is hereby authorised to sign and give the above notice to quit to Messrs. Hall, of which the solicitor is to be apprised."

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The notice was signed by Mr. Ker, in pursuance of that order, Mr. Scovell, the secretary, not being then present.

On the 16th of December, 1833, the following demand of possession, signed by the plaintiff, the said William Stennett, and Ellis, their mortgagee, was served upon the defendants:

"To Messrs. William Hall and Thomas Spencer Hall, or whom else it may concern.—Take notice, that we, the undersigned W. Ellis, T. Wilkinson, and W. Stennett, hereby demand of and require you to deliver up to us, or to some or one of us, the immediate and peaceable possession of all that quay or wharf called or known by the name of Botolph Wharf, with the warehouses, vaults, buildings, and appurtenances thereto belonging, situate &c., pursuant to a notice to quit the same premises heretofore served upon you, bearing date the 12th of September, 1833, and signed by J. Ker, therein described as secretary to the Commissioners of his Majesty's Customs, on behalf of the said Commissioners and by their authority, and with the consent of the persons to whom the said wharf was agreed to be sold. And take notice, that in case of your neglect and refusal to deliver up the same pursuant to this notice, we shall hold you liable to pay to us, or to some or one of us, and shall, or some or one of us shall, proceed to recover from you double the value of the rent of the said *premises for such time as you shall continue to hold over the same after the date and delivery of this present notice and demand, according to the terms of the Act in such case made and provided. And you are hereby further required to take notice, that this present notice and demand of possession of the aforesaid premises shall not operate or be taken or considered, and that the same is not meant, as a waiver or abandonment of a certain notice to quit the above-mentioned premises heretofore

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served upon you, signed by us the undersigned, and bearing date the 11th of December, 1833, in case the said notice so signed by John Ker and served upon you as aforesaid should not be legally sufficient to end and determine your tenancy of and in the aforesaid premises on any of the days in the said last-mentioned notice specified."

On the 11th of December, 1833, the following notice to quit, mentioned in the foregoing demand of possession, and signed by the same parties, had been served on the defendants: "To Messrs. Wm. Hall and T. S. Hall, or whom else it may concern. —Take notice, that you are hereby required to quit and deliver up to us the undersigned W. Ellis, T. Wilkinson, and W. Stennett, or either of us, on the 14th day of June next, the peaceable and quiet possession of all that quay or wharf called or known by the name of Botolph Wharf, with the warehouses, vaults, buildings, and appurtenances thereto belonging, situate &c., and now in your tenancy or occupation, provided your tenancy thereof originally commenced at that period of the year, or otherwise that you quit and deliver up the possession of the said premises at the end of the current year of your tenancy thereof which shall happen next after the end of half a year from the time of your being served with this notice, and also, provided your tenancy of and in the aforesaid premises shall not cease and determine *on either of the 12th, 13th, or 14th days of the present month of December, by reason and in consequence or under or by virtue of a certain notice to quit the same premises heretofore served upon you, bearing date the 12th of September, 1833, and signed by John Ker, therein described as Secretary to the Commissioners of his Majesty's Customs, on behalf of the said Commissioners and by their authority, and with the consent of the persons to whom the said wharf was agreed to be sold. And you are hereby further required to take notice, that we do hereby expressly declare that this present notice shall not operate or be taken or considered, and that the same is not meant, as a waiver or abandonment of the said notice so signed by the said John Ker and served upon you as aforesaid, in case that notice is legally sufficient to end and determine your tenancy of and in the aforesaid premises on any of the days

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therein specified. And we the undersigned W. Ellis, T. Wilkinson, and W. Stennett do hereby reserve to ourselves, and any or either of us, full power of adopting and acting upon the said notice so already served upon you as aforesaid, and of holding you liable for the double value of the said premises in case you shall hold over the same. or any part thereof, after any of the days mentioned in the notice so served upon you as aforesaid, provided your tenancy shall be thereby determined."

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The defendants did not quit or deliver up possession of the premises, or any part thereof, at the expiration of either of the notices to quit above set forth; and on the 1st of November, 1834, an action of ejectment was commenced in the name of John Doe on the three several demises of the plaintiff, W. Stennett, and W. Ellis, for the purpose of recovering possession of the premises. That action was tried on the 23rd of December, 1834, when the defendants, by their counsel, *consented that a verdict should pass for the plaintiff in that action, subject to a Judge's order that execution thereon should be stayed for five weeks from that day. A verdict was taken for the plaintiff, and execution stayed accordingly; and judgment in the said action of ejectment was not signed until the 18th of February, 1835. Possession of the premises was obtained on the 6th of April following, under and by virtue of a writ of possession issued on the judgment. In the interval between the judgment and obtaining possession, application was made to the defendants to give up the possession; but the premises being used for the purpose of bonding goods, and there then being upon the premises many bonded goods, upon which duties were due and payable to the Crown, which goods could not legally be removed until the duties had been paid, and the goods in question belonging to many different individuals, the defendants did not give up immediate possession of the premises. They, however, tendered possession thereof with the before-mentioned goods thereon; which tender was objected to, and possession refused, on the ground that the same was not such a possession as the plaintiff in ejectment, under his writ of possession, was entitled to.

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The defendants had never paid any rent in respect of the

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said premises, either to the plaintiff or to his partner, W. Stennett.

The defendants objected that the plaintiff was not entitled to a verdict in the present action on any of the counts in the declaration.

The objections to a verdict on either of the counts for double value were,

First,—That there was no proof of any such tenancy as was stated in the first or second counts of the declaration, which tenancy the defendants having put in issue by their pleas, the plaintiff was bound to establish.

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Secondly,—That there was no evidence to prove, but, on the contrary, that the evidence, and particularly the deeds of the 2nd and 3rd of December, 1833, and of the 4th and 5th of December, 1833, disproved that the plaintiff was seised of the reversion at the times and in manner and form as in the first and second counts alleged; which allegation the defendants having traversed, the plaintiff was bound to sustain.

Thirdly,—That the tenancy created by the agreement of the 12th of June, 1832, was not a tenancy for any term of life, lives, or years, within the meaning of 4 Geo. II. c. 28, s. 1, so as to subject the defendants to an action for double value, if in other respects the requisites of that statute had been complied with.

Fourthly,—That the tenancy created by the agreement of the 12th of June, 1832, was not so put an end to as to entitle the plaintiff to sue for double value, either by the notice to quit of the 12th of September, or by that of the 12th of December, 1833; because, as respects the notice of the 12th of September, there was no proof of any sufficient authority given to the party who signed the same; and the notice, if given by the authority of the persons then entitled to the reversion, would not entitle a party to whom the reversion was conveyed after the giving the notice, and whilst it was running, to take advantage thereof in order to sue for double value. And with respect to both notices, that if either of them determined the tenancy, still the reversion at the time the tenancy was so determined was not in the plaintiff, but in W. Ellis, who, if any one, ought to have sued.

The defendants further objected, that, if liable to double value

at all, they were not liable for any time after the day of the demise mentioned in the declaration of ejectment. WILKINSON
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As to the count for use and occupation, the defendants *objected, that the plaintiff could not recover, inasmuch as before the 15th of December, 1833, the reversion of the premises had been conveyed to Wynn Ellis, and the defendants were liable to him, and not to the plaintiff. [*524]

The questions for the opinion of the Court were,

Whether the four objections of the defendants to the claim for double value, and the objection to the claim for use and occupation, above particularly stated, or any of them, were well founded. If the Court should be of opinion that, notwithstanding the objections above stated, the plaintiff was entitled to a verdict on either or both of the counts for double value, then a verdict was to be entered on either or both counts accordingly for a sum calculated at the rate of 335*l.* 11*s.* 3*d.* per quarter (the single value), from such a period, and for such a time, as, in the opinion of the Court, the plaintiff was entitled to.

If the Court should be of opinion that the plaintiff was entitled to recover for use and occupation, then a verdict was to be entered on the last count for such a sum as the Court should direct. If the plaintiff was not entitled to a verdict on any of the counts in the declaration, a nonsuit was to be entered. If entitled to a verdict on one or more, but not on the whole of the counts, then a verdict was to be entered for the defendants on the others, or other, as the case might be.

[After argument:]

TINDAL, Ch. J. :

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This is an action of debt, in which the plaintiff seeks in his first and second counts to recover double the yearly value of the premises in the declaration mentioned; and in his third, a sum for the use and occupation of the same.

In the first count, which goes for double value, the plaintiff alleges that the defendants held an undivided moiety of the premises as tenants thereof to the plaintiff; that is to say, as tenants thereof for a term of years, from year to year, for so long

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a time as the plaintiff and defendants should respectively please. And in the second, that they held an undivided moiety as tenants thereof to the plaintiff, for the residue and remainder of a certain tenancy for a term of years, to the defendants granted in June, 1832, the reversion of the undivided moiety of the said tenements, during all that time, being in the plaintiff; contending, therefore, that the agreement of June 12, 1832, is subject to the construction he has put upon it. The defendants have pleaded to the first and second counts, first, that they did not hold for the term or time in those counts mentioned: and the question is, whether the allegation of tenancy, as laid in the two first counts, has been made out in evidence: I am of opinion it has not. Taking it from the agreement itself, or from the recital in the bond of June, 1832, it was a tenancy *at so much a quarter, and for the quarter only. I think, therefore, that the allegation on the first count, that the defendants held the premises as tenants thereof for a term of years, from year to year, and the allegation on the second, that they held them as tenants for the residue of a tenancy, for a term of years, has not been made out. Look at the condition of the bond: the inducement states that the above bounden W. Hall, and T. S. Hall, have this day become tenants to Charles Andrew Scovell, Esq., Secretary to the Commissioners of Customs, in trust for his Majesty, of certain premises called and known by the name of Botolph Wharf, at the rent of 375*l.* a quarter; words which seem to carry the intention of the parties no further than the quarter for which the 375*l.* rent is to be paid. Look again at the situation of the parties, which rendered it improbable the premises should be demised on a yearly holding, the Lords of the Treasury being the owners, who purchased the property, only for the purpose of disposing of it to advantage: and how much more easily would that be effected, if they had the power of dismissing the occupier at the end of three months. But it does not rest there; for the same construction has been put on these deeds by the conduct of parties themselves, the Lords of the Treasury on the day they took the property, having given notice to the defendants to quit at the end of a quarter, and the defendants having never objected to such notice. The two first counts therefore have not been proved: it becomes necessary

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to decide the case on other points ; and I do not affirm or deny that the statute of Geo. II. applies to a holding by the quarter, because the authorities on that head, cannot set right the plaintiff's declaration.

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I now come to the last count, which is for use and occupation. Inasmuch as the defendants have never paid rent to the plaintiff, nor acknowledged his title by any act, they are not estopped in a court of law to *shew that the plaintiff had no title, and the question is whether that objection arises out of the deed of 1833. It appears that the legal estate in fee was in the plaintiff on the 3rd of December, and that it vested in Wynn Ellis on the 5th by a deed of mortgage. The effect of that deed was to vest the fee in Wynn Ellis from the day it was executed, and even the proviso for reconveyance on payment of principal and interest does not affect his legal right to the fee: the question is whether a subsequent part of the deed does not operate as a redemise of the premises to the mortgagor for a term of seven years: and we think that it has that effect. After the covenant for reconveyance, comes a proviso that the mortgagee will not call in his principal till 1840: then, if the interest were kept down, that it should and might be lawful for the said T. Wilkinson and W. Stennett respectively, and their respective heirs and assigns, peaceably and quietly to have, hold, occupy, possess, and enjoy the said wharf or quay and hereditaments thereby appointed and released, or intended so to be, with their appurtenances, and to receive and take the rents, issues, and profits thereof, and of every part thereof, for their respective own use.

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It is contended, on the part of the defendants, that such power is only vested in the mortgagor on the payment of 13,000*l.* on the fifth of June, 1834: but the proviso for payment on that day is altered by the mortgagee's subsequent covenant not to call in the money till 1840, and the powers conferred on the mortgagor, vest in him a leasehold estate for seven years. Nor would this be an injury to the mortgagee, or in any way impair his security, for he is still empowered, if the interest be unpaid, to enter on the premises and compel payment of principal and interest. The instrument, therefore, falls within the principle laid down in Bacon's Abridgement, tit. Leases, K. (which head is supposed

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to be the production of Chief Baron GILBERT), **“that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose.”* Here there was an estate vested in the mortgagor by re-demise, not divested at the time of the action; and the defendants having occupied by permission of the plaintiff, he is entitled to recover on the third count in the declaration.

PARK, J. concurred.

GASELEE, J., not having heard the argument, forbore to express any opinion.

VAUGHAN, J.:

Looking at this agreement, I can see nothing in it that points to a yearly taking; on the contrary, the reservation of rent, and other stipulations, plainly shew that the letting was by the quarter only. Whether such a holding comes within the enactment of Geo. II. is a grave question, which I do not decide; but I have no doubt that an action for use and occupation lies. The deed shews a studious anxiety to give a legal right to the mortgagor to hold the premises till the year 1840, notwithstanding the conveyance to Wynn Ellis in fee. In modern times it has been usual to insert these special provisos in mortgage deeds, and the effect of them is to give the mortgagor complete control over the property as tenant for years, to the mortgagee. Then, to support the action for use and occupation, the plaintiff must shew an occupation by the defendant; the value of the premises; *and that the defendant occupied by permission of the plaintiff. The two first points are not contested here, and the last must be implied from the situation and conduct of these parties.

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*Judgment for plaintiff on the third count, for
 defendants on the first and second.*

JAMES v. SALTER AND ANOTHER (1).

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Nov. 12.(3 Bing. N. C. 544—555; S. C. 4 Scott, 168; 3 Hodges, 70; 6 L. J. (N. S.)
C. P. 171; 1 Jur. 135; 5 Dowl. P. C. 496.)

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Since 3 & 4 Will. IV. c. 27, a distress or action for an annuity accruing by will, must be resorted to within twenty years from the death of the testator.

REPLEVIN of chattels distrained in a dwelling-house, farm, and lands in the parish of Uffculme, Devon, on the 17th of March, 1835.

The defendants by their avowry and cognisance alleged, that the dwelling-house, farm, land, and premises in which, &c. heretofore, to wit, on the 10th of November, 1804, were the freehold premises of one James Salter, since deceased, late father of the defendant Salter, and continued so until, and at the time of the decease of the said J. Salter; that the taking of the said goods and chattels as in the declaration mentioned, was done under and in pursuance of a certain power contained in the last will and testament of the said J. Salter, deceased, bearing date the 3rd of August, 1800, for raising and paying a certain annuity, yearly rent, or sum of 30*l.* given and bequeathed in and by the said will to the defendant Salter, and charged and chargeable on the said freehold premises *of J. Salter, deceased; and because the sum of 870*l.* part of the said annuity, yearly rent, or sum of 30*l.* accruing due at Christmas Day last, was behind and unpaid for the space of twenty days after the said Christmas Day, the same having been lawfully demanded, and not paid, the defendant Salter, in his own right avowed, and the other defendant as bailiff to the defendant Salter, acknowledged the taking the said goods and chattels in the declaration mentioned, to satisfy the said arrears, according to the purport, tenor, and effect of the said will; and that, the defendants were ready to verify.

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(1) See this case referred to in judgment of the Court of Exchequer in *Grant v. Ellis* (1841) 9 M. & W. 113, 124; *Magdalen Hospital v. Knotts* (1878) 8 Ch. Div. 709, 727, 47 L. J. Ch. 726, 733; *affd.* 4 App. Cas. 324;

Irish Church Commissioners v. Grant (1884) 10 App. Cas. 14, 27; *Howitt v. Earl of Harrington*, '93, 2 Ch. 497, 502, 62 L. J. Ch. 571, 574; *Earl of Devon's Settled Estates*, '96, 2 Ch. 562, 568, 65 L. J. Ch. 810, 813.—R. C.

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The plaintiff pleaded in bar, secondly, that the said distress in the avowry and cognisance mentioned, was not made at any time within twenty years next after the time at which the right to make a distress for the arrears of the said annuity, yearly rent, or sum of 30*l.* first accrued to the defendant Salter; and that, the plaintiff was ready to verify. Thirdly, that it was not made within six years after the said arrears, in respect of the said annuity, yearly rent, or sum of 30*l.* first became due: concluding with a verification.

As to the second plea, the defendants replied, that so far as the same related to 585*l.*, part of the money in the avowry and cognisance mentioned, the distress was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being the arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant Salter. And as to the residue of the second plea in bar, so far as the same related to the residue of the money in the avowry and cognisance mentioned, the defendants relinquished their avowry and cognisance, and prayer of judgment, so far as the same related thereto. And to the third plea, the defendants replied, that the distress was made within six years next after the arrears in respect *of the annuity, yearly rent, or sum of 30*l.* first became due.

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The jury, in a special verdict, set out the will of James Salter, the father of the defendant Salter, by which it appeared, that he had charged his freehold property with the annuity set forth in the avowry: they then found that the said J. Salter, the father of the defendant Salter, died in the year 1804, without having revoked or altered his said will; that, on the 17th of March, 1835, the defendant Salter, and the other defendant Facey, as his bailiff, took the goods and chattels in the declaration mentioned, as for and in the name of a distress, for the sum of 870*l.* for twenty-nine years' arrears of the said annuity, or yearly rent, or sum of 30*l.*, ending at Christmas, 1834; and that the defendant Salter never received any part of the said annuity.

[The case having been argued, the COURT took time for consideration.]

TINDAL, Ch. J. :

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The question which has been argued before us, arises upon a special verdict found on the second and last issues raised between the parties to this action : the second issue being upon the question, “ whether the distress, so far as relates to 585*l.*, part of the money in the avowry and cognisance mentioned, was made within twenty years next after the time at which the right to make a distress for the said sum of 585*l.*, and every part thereof, being arrears of the said annuity, yearly rent, or sum of 30*l.*, first accrued to the defendant John Salter ; ” and the last issue being upon the question, “ whether the distress in the avowry and cognisance mentioned, was made at any time within six years next after the arrears in respect of the said annuity, yearly rent, or sum of 30*l.* first became due.” Of these two issues, the first appears to us to be the principal and, indeed, the only important one ; for if the plaintiff is entitled to judgment in his favour on that issue, the right and title of the defendant Salter to the annuity is altogether barred ; and he cannot, in any view of the case, be allowed to recover the arrears for the last six years, to which only the pleadings on which the last issue is raised can be held to apply.

The facts which are found by the special verdict on the two issues, are few and simple : That John Salter, the father of the defendant of that name, by his will duly made and published, devised the property therein mentioned to trustees, to the intent that they should, out of the rents and profits, pay to John Salter the defendant, during the term of his natural life, an annuity or clear yearly rent of 30*l.*, by four quarterly payments, to commence on the first quarterly day of payment after his decease ; with a power of distress, if the annuity should be in arrear for twenty days next after any quarterly day of payment. That the testator died in 1804 without having revoked or altered his will ; and that, on the 17th of March, 1835, the defendants distrained for 870*l.* for twenty-nine years’ arrears of the annuity ending at Christmas, 1834.

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Upon this state of facts, it appears that the right to make a distress for the annuity, first accrued to John Salter the son, on the expiration of the twenty days next after the first quarterly

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day of payment subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appears, that so far as there is any allegation on the record, or any finding by the jury, there was no payment or receipt of the annuity by the defendant Salter before the distress was put in in March, 1835; for it was then put in by the defendant for the whole of the arrears since the death of the testator. And, although the defendant has by his own voluntary act, in his replication to the plea in bar, abridged the amount of the arrears for which he had distrained and avowed, that is, from twenty-nine years to nineteen years and a half, still this act of the defendant has no bearing on the fact appearing from the record, that no distress was made for twenty-nine years after the right to distrain first accrued.

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Now upon reference to the statute 3 & 4 Will. IV. c. 27, *it appears to have provided two distinct periods of limitation, within which all distresses for arrears of annuities must be made, the two periods being prescribed in respect of claims and objects in their own nature perfectly distinct. The second section (1) contemplates and provides for the case, where the right or title to the annuity itself is disputed; and directs, "that no person shall make a distress for any rent but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same." The forty-second section contemplates and provides for the case, where the title to the annuity is not disputed, but the distress is made for arrears due; and for that purpose directs, "that no arrears of rent shall be recovered by any distress, but within six years next after the same respectively shall have become due." The second issue arises upon a plea in bar, framed upon the second section; the last issue arises upon a plea in bar intended to be framed, though not accurately or aptly framed, on the forty-second section.

Now with respect to the second issue, it is manifest, that the facts found in the special verdict will bring the case precisely within the provision of the second section of the Act, unless

(1) See now the Real Property c. 57), sections 2 and 9, and S. L. R. Limitation Act, 1874 (37 & 38 Vict. Act. 1883 (46 & 47 Vict. c. 39).—R. C.

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that section is to be governed and controlled, not simply explained and construed, by the third; that is, unless the third section does in terms, exclude from the operation of the second, the claim of any person whose right to a rent is derived under a will, by reason of the words "other than by will" which are found in the third section. And when this case was originally before the Court upon a motion for a new trial, after the rule had been made absolute upon a ground perfectly distinct from that which is now before us, an opinion was expressed by the Judges then in Court, that the present case was *excluded from the operation of the second section by reason of its not being comprehended within the third; which third section appeared to us, upon a more hasty view, to contain an enumeration of instances to which only the second section could be held to be applicable. For myself, however, I am ready to admit, and I am authorised at the same time to say the same for my three brethren who were then in Court, that the further argument which we have heard on this point, when brought directly before us for judgment upon the record, and the further opportunity for consideration which has been afforded us, has induced us to alter the opinion we then formed, and that we think (in which my brother VAUGHAN entirely concurs with us), that this case is governed by the second section of the statute, which under the facts found in the special verdict, affords a bar to all claim and title to the annuity.

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That the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and, upon a more close examination of the third section, the object and intent of it seem to us, to be no more than this: to explain and give a construction to the enactment contained in the second clause as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second. Many reasons concur to shew that such must be the just construction of the Act. In the first place, if it had been intended that the third section

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should limit the application of the second to those cases, and those only, which are enumerated in the third, it might justly have been expected that words would *have been employed to express clearly and distinctly such an intention. But in this section there are no words that can be said directly to exclude all instances except those enumerated in the third section. Again, if the words "granted by an instrument other than by will" were to be held to prevent the application of the statutory limitation of twenty years to claims of land or rent granted by will, it would be at direct variance with other parts of the statute, for the instance in the third section immediately following that now under consideration, which provides for cases of claims in respect of estates in reversion or remainder, "or other future estates or interests," is large enough to comprehend and would comprehend all executory devises; and again, section forty expressly provides for the case of any legacy. And indeed, the words, "by any instrument other than by will" carry the matter no further than if the third section had proceeded by attempting to enumerate every species of instrument by which an estate in land or rent could have been granted, and had omitted to mention a will, in which case the only inference that could be drawn from such omission would have been, that the case not being enumerated in the third section, fell back upon the general provision contained in the second. Indeed, unless this is held to be the true construction, the case which is likely to occur perhaps with the most frequency, viz., the devise of an estate in possession in land, or of an estate in possession in a rent-charge first created by the will, would be altogether unprovided for by the statute. For the third class of instances enumerated in section three, describes the grant to be "by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent," a description which can neither apply to the case of a devise of a particular estate in land, or of a newly created rent; for the devisor who has by

[*555] *his will carved an estate in land out of the estate whereof he was seized, can never be said to have been possessed in respect of the same estate or interest, as that claimed by the devisee; still less can the devisor who creates a new rent-charge by his will be said

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to have been in the receipt of the rent. The case therefore under discussion, not falling within the third section, but falling within the clear and unambiguous terms of the second, we hold to be governed thereby; that the claim and title of the defendant Salter to the annuity is barred by the lapse of twenty years since his right to distrain first accrued; and that the verdict upon the second issue must be entered for the plaintiff.

As to the last issue founded upon the limitation of six years given by the forty-second section, it becomes of little importance whether the verdict thereon be entered for the plaintiff or the defendant, any further than as the costs dependent on that issue are affected by such finding. For there being but one avowry, and the plaintiff being entitled to judgment on the issue raised on one of his pleas in bar, the avowant's claim to the return of the cattle, &c. is completely barred whatever may become of the other pleas in bar.

Now taking the last issue as if it stood alone, which appears to be the correct mode of considering the question, and applying thereto the finding in the special verdict, we think it appears that the distress was made within six years next after the arrears of the annuity became due. For upon the last issue there is no objection made to the avowant's right or title to the annuity itself, but simply to the amount of arrears claimed beyond those of the last six years, and the distress was evidently made within time for the last six years.

We therefore think the verdict on the last issue must be entered for the defendant; but that upon the whole record the judgment must be for the plaintiff.

Judgment for the plaintiff.

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(3 Bing. N. C. 570—589; S. C. 4 Scott, 337; 2 Hodges, 281; 6 L. J. (N. S.) C. P. 225; 2 Carp. P. C. 314.)

1837.
Jan. 30.
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A patent was taken out "for an improvement or improvements in the making or manufacturing of elastic goods or fabrics applicable to various useful purposes," and the patentee in his specification, which was enrolled in July, 1833, described his invention in general terms to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same

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might be applicable to: he then described more particularly three distinct objects which he proposed:

The third object proposed by the patentee, was, "to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords or strands of Indian rubber coated or wound round with filamentous material:" he afterwards described the mode of effecting the third object to be, "by introducing into the fabric threads or strands of Indian rubber which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise; these strands of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required: That by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, he was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportion of the elastic and non-elastic material:" he added, "that the strands of Indian rubber were, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in a former specification to another patent; and being in that state introduced in the fabric, they acquired their elasticity by the application of heat after the fabric was made:" Held, that this invention was properly the subject-matter of a patent, and that it was sufficiently described as above.

[Action for infringement of Sievier's patent.]

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At the trial before Tindal, Ch. J. and a special jury of Middlesex, [the plaintiff] gave in evidence the following specification of the invention of Sievier, sealed on the 17th of January, 1833, and enrolled in the month of July following:

"My invention of an improvement or improvements in the making or manufacturing of elastic goods or fabrics, applicable to various useful purposes, is designed for the production of an elastic web, cloth, or other manufactured fabric for bandages, and for such articles of dress as the same may be applicable to.

"The first object which I propose, is to manufacture an article by the ordinary knitting frame, or similar kind of machinery, in which cords or strands of Indian rubber shall be introduced between the loops or stitches of the fabric, for the purpose of forming elastic cords or bands round the margins or other parts of stockings, socks, gloves, night-caps, drawers, and various other articles of clothing. The second object, is to manufacture in the ordinary loom an elastic woollen cloth, by the introduction of cords or strands of Indian rubber among the longitudinal threads or yarns which constitute the chain or warp, and also among the transverse threads or yarns which constitute the weft

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or shoot, and which cloth shall be capable of being afterwards felted and dressed with a nap. The third object is to produce cloth from cotton, flax, or other suitable material not capable of felting, in which shall be interwoven elastic cords or strands of *Indian rubber, coated or wound with a filamentous material.”

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After describing the manner in which the first and second objects were attained, the specification proceeded with reference to the third, as follows: “In manufacturing an elastic cloth from cotton, flax, or other material which is not intended to be milled or felted, I introduce into the fabric threads or strands of Indian rubber, which have been previously covered by winding filaments tightly round them through the agency of an ordinary covering machine, or otherwise; these strands of Indian rubber being applied as warp or weft, or as both, according to the direction of the elasticity required. By thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, I am enabled to produce a cloth which shall afford any required degree of elastic pressure, according to the proportions of the elastic and non-elastic material.

“It remains only to add, that the strands of Indian rubber are, in the first instance, stretched to their utmost tension, and rendered non-elastic, as described in my former specification; and being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made.

“Lastly, as my invention consists solely in the employment of strands of Indian rubber in connection with yarns, in the way described for manufacturing elastic goods or fabrics, I have not deemed it necessary to describe any particular kind of machinery for carrying the same into effect, as such machinery is well known and forms no part of my invention.”

With respect to the first and second objects of the patent, there was little or no contest. The plaintiffs’ witnesses deposed that Sievier’s invention had, as to those objects, effected an improvement not in public use *before; and the defendant called no witnesses to contradict this.

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With respect to the third object, scientific witnesses called by the plaintiffs, proved that Sievier’s invention had effected an improvement on any manufacture of the sort known before: that

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the article produced was lighter, more porous, and yielded more than any that had preceded it; it adapted itself more easily to the human frame, and was considerably cheaper: medical witnesses also proved that for these reasons it was a great improvement for use in surgical cases. Then, persons conversant with the trade, deposed that there were not above six or seven manufacturers of similar articles in London; that previously to the date of the plaintiff's patent, the witnesses had never seen such an article as his in the market; and that it was extensively sold in March and April, 1833. A witness, who had lived as a servant with the defendants from October, 1832, to April, 1833, proved that during that period they had never manufactured the article.

The defendants' witnesses, on the other hand, spoke very lightly of the merits of the article. One of them said he thought it a production likely to bring a former article made entirely of elastic threads, into contempt: another said it was not so good, because, though cheaper, it was heavier: others said they had made it at one time, but soon relinquished it and went back to the article made entirely of elastic threads.

To disprove the novelty of the invention, the defendants called various witnesses, who said they had made this article and dealt with it in trade before the date of the plaintiff's patent, and also that the defendants themselves had made it a year before. They also put in a former patent of Sievier's and one of Thomas Hancock, which, as they insisted, comprehended the present invention. Those patents were as follows:

[576]. Sievier's, sealed 1st of December, 1831. Enrolled, June, 1832.

" This invention consists in the application or employment of filaments, threads, or strands of caoutchouc or Indian rubber, to or for the making, manufacturing, or constructing, of elastic cables, ropes, whale fishing and other lines, lathe and rigger bands, bags and purses; such filaments, threads, or strands of caoutchouc or Indian rubber, being previously platted over or covered with hemp, flax, silk, wool, cotton, catgut, Indian grass, strips of leather, or other fit and proper materials; part of which articles, when so manufactured, are applicable to various other purposes.

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“As filaments or threads of Indian rubber, covered with cotton, silk, and other materials, are now commonly used in the manufacture of many articles where elasticity is required, and as such filaments or threads are covered with different materials by various kinds of machines applicable to the purpose, it is not necessary for me to describe any particular machinery by which the filaments, threads, or strands of Indian rubber, required for the different articles to be manufactured in my improved manner are to be platted, intermixed, or covered with the materials. I therefore shall only state generally, that the filaments, threads, or strands of caoutchouc, are prepared by cutting them from any convenient sized or shaped piece of Indian rubber into long strips, which are afterwards stretched to their utmost tension, and wound upon drums, reels, or bobbins, ready to be platted over or covered by, or interwoven with, the various materials before mentioned.”

After describing the mode of applying the invention in the manufacture of cables, &c., the specification proceeded,

“My improved bags and purses are composed of knitting or network, made of strands or cords of the filaments prepared as above described, and which are capable of *being made into purses or bags by hand; or the filaments, strands, or cords, prepared as above described, may be knitted, netted, or platted into purses or bags, by machinery or by hand. As there are so many descriptions of bags to which these improvements in the construction may be applicable, it is not necessary to state further, than that in any case where elasticity may be required, the bag or purse may be made wholly of the above materials, or only parts used; for instance, in making carpet travelling-bags, I should only form the ends or edges of the bags of the elastic material, covered, when stretched to its utmost extension, with leather, or other suitable substance, which will be capable on collapsing, of drawing up the leather, or other covering, into puckers or gathers, so as to allow of the bag enlarging very considerably, when any extra quantity of articles are put into it.”

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Hancock's, sealed and enrolled 8th of August, 1820.

“Invention of an application of a certain material to various

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articles of dress and other articles, that the same may be rendered more elastic.

“The material I use is caoutchouc; I cut it into slips of a convenient length and thickness, according to the purpose for which it is to be used, and the degree of elasticity necessary. If the quality of the caoutchouc is not the best, or the spring is not required to be very substantial, I prepare these slips by putting them into hot water, and steeping them awhile to prevent their cracking on the edges: when the substance of the spring is required to be more considerable, or the quality of the caoutchouc better, I use it without such preparation. I apply the caoutchouc spring to gloves in the following manner: A case or pipe of leather, linen, or cotton, or other similar material, is made as long as it is necessary the spring should stretch; the spring is then fastened at the extremities of the pipe or case, by sewing or otherwise, *in such a manner as that the pipe may contract and gather up very considerably. The case or pipe is then fixed in the wrist of the glove so as to contract the glove to the size of the wrist,—care being taken not to make the spring so strong but that the glove will easily draw over the hand. The case or pipe may be made in the glove itself, and the spring be introduced in the manner I have described. Attention must be paid in fastening the caoutchouc that it is not pierced any where between the extremities by the needle, otherwise it will be liable to tear and break. In a similar manner I apply the caoutchouc spring to any other article of dress where elasticity is desirable at any particular part. I apply the caoutchouc springs to waistcoats and waistbands, to make them contract and sit close to the body; to coat sleeve linings to draw them closer round the waist; to the mouth of pockets to prevent their contents from falling out when in an inverted position, and prevent their being easily picked; to trowsers and to gaiter straps to enable them to lengthen and shorten to the bend of the knees and ankle joints; to braces, instead of wire and other springs, as now commonly used; to stockings to prevent their slipping down the leg; to garters; to shirt wrists; to the knees of drawers and breeches; to wigs, false curls, and fronts, to keep tight on the head; to pocket-books and purses, instead of the strap and loop,

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and wire springs; to riding belts; to stays, and such part (1) of the apparel and dress of women as require to be kept close to the person, and yet to be elastic; as fastenings to boots, shoes, clogs, and pattens, when the object is to take them off and on without any difficulty, unlacing, or tying: I apply caoutchouc to the soles of boots, shoes, and clogs, by making either the whole sole of caoutchouc, or the inner or outer sole only, or by fastening a piece of caoutchouc between the soles; and, in either case, boots, shoes, and clogs are *rendered more elastic to the foot. I apply the caoutchouc springs to stiffeners for neckcloths. I use caoutchouc in springs to render them elastic to the foot, by forming a piece to the bottom of the stirrup, which I fasten in by having holes drilled in the stirrup and sewing in the caoutchouc with wax-thread or wire, or by rivetting or screwing it on with iron.

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“In this specification I do not insist upon any particular mode of applying or fastening caoutchouc to the various articles described, as that may be varied as convenience may require; my object being to produce and apply a better kind of spring than any now in use for the purposes above mentioned.”

TINDAL, Ch. J. left it to the jury to say whether the plaintiffs' invention was an improvement; and whether it was in public use and operation at the time the letters patent were granted.

A verdict was found for the plaintiffs, with leave for the defendants to move to set it aside upon any objection arising out of the specifications, or former patents.

In Hilary Term, 1886, *Sir F. Pollock* moved to enter a nonsuit on the ground that the invention for which the patent had been taken out, was not the subject of a patent, or at all events was not shewn to be so in the specification. It was not the subject of a patent, because the plaintiff only proposed to make a cloth that should have a particular kind of thread in it; a mere combination of objects known before: *Saunders v. Aston* (2); and the specification was insufficient, because instead of explaining the process, it merely stated that the patentee introduced this thread.

A new trial was also moved for on the ground that *the verdict was against the evidence, particularly with regard to the effect of

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(1) *Sic*.

(2) 37 R. R. 574 (3 B. & Ad. 881).

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the former patents; and that since the trial the defendants had discovered that a patent had been taken out by one Desgrand in November, 1832, for the same objects as the plaintiffs'. Desgrand's patent was enrolled in May, 1833.

It was suggested that there had been a misdirection in the omission to explain to the jury that a previous public use of the article in question would avoid the plaintiffs' patent, although such public use had not been general; and *Webster v. Uther* (1) was referred to, in opposition to *Lewis v. Marling* (2) and *Jones v. Pearce* (3), which had been cited on that head for the plaintiffs. It turned out however, that the jury had been expressly directed to consider whether there had been a public use of the article before the plaintiffs' patent; and a rule *nisi* for a new trial was granted on the other ground only.

[After argument, the Court took time for consideration.]

[584] TINDAL, Ch. J. :

The discussion on this case, arises on a motion to the Court to set aside a verdict obtained by the plaintiffs, as assignees of the original patentee, in an action for the infringement of a patent, and to grant a new trial upon three grounds; first, that in point of law the invention, for which the patent was taken out, was not the subject-matter of a patent; secondly, that the verdict was against the evidence given at the trial; and thirdly, upon facts disclosed in an affidavit.

[*585] The patent in question, which bore date the 17th of January, 1833, was "for an improvement or improvements in the making or manufacturing of elastic goods *or fabrics, applicable to various useful purposes," and the patentee in his specification, which was enrolled in July, 1833, described his invention in general terms to be designed for the production of an elastic web-cloth or other manufactured fabric, for bandages, and for such articles of dress as the same might be applicable to. And then described more particularly the three distinct objects which the patentee proposed.

(1) Godson, Pat. Law, 232 (Higgins Dig. Pat. Cus. No. 933).

(3) Godson, Pat. Law, 46 (1 Web. P. C. 122).

(2) 34 R. L. 313 (10 B. & C. 22).

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At the trial of the cause it was admitted on the part of the defendants, that the principal ground on which the patent was sought to be impeached, was with reference to the third object, described in the specification; and the whole of the evidence produced by the defendants, and the main part of the argument before us, applies itself to that object alone.

The third object proposed by the patentee, was “to produce cloth from cotton, flax, or other suitable material, not capable of felting, in which shall be interwoven elastic cords or strands of Indian rubber, coated or wound round with filamentous material.” The patentee afterwards describes the mode of effecting the third object to be, by introducing into the fabric threads or strands of Indian rubber, which have been previously covered by winding filaments tightly round them, through the agency of an ordinary covering machine or otherwise: these strands of Indian rubber, being applied as warp or weft, or as both, according to the direction of the elasticity required. That by thus combining the strands of Indian rubber with yarns of cotton, flax, or other non-elastic material, the patentee was enabled to produce a cloth which should afford any degree of elastic pressure, according to the proportions of the elastic and non-elastic material. The patentee added, “that the strands of Indian rubber were, in the first instance, stretched to their utmost tension and rendered non-elastic, as described in a former specification *to another patent: and being in that state introduced in the fabric, they acquire their elasticity by the application of heat after the fabric is made.”

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Now the first objection made to the patent so described, is, that the invention is not the subject-matter of a patent. That it is neither a new manufacture, nor an improvement of any old manufacture; but is merely the application of a known material, in a known manner, to a purpose known before.

The question therefore, as to this point is, does it come under the description of “any manner of new manufacture” which are the terms employed in the statute of James? That it is a manufacture, can admit of no doubt; it is a vendible article produced by the art and hand of man; and of all the instances that would occur to the mind when inquiring into the meaning

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of the terms employed in the statute, perhaps the very readiest, would be that of some fabric or texture of cloth. Whether it is new or not, or whether it is an improvement of an old manufacture, was one of the questions for the jury upon the evidence before them; but that it came within the description of a manufacture, and so far is an invention which may be protected by a patent, we feel no doubt whatever. The materials indeed are old and have been used before; but the combination is alleged to be, and if the jury are right in their finding, is new, and the result or production is equally so. The use of elastic threads or strands of Indian rubber previously covered by filaments wound round them, was known before; the use of yarns of cotton or other non-elastic material was also known before; but the placing them alternately side by side together as a warp, and combining them by the means of a weft when in extreme tension and deprived of their elasticity, appears to be new; and the result, namely, a cloth, in which the non-elastic

[*587] *threads form a limit, up to which the elastic threads may be stretched, but beyond which they cannot, and, therefore, cannot easily be broken, appears a production altogether new. It is a manufacture, at once ingenious and simple. It is a web combining the two qualities of great elasticity, and a limit thereto.

The second objection to the verdict is, that it is against the evidence. The only issue to which this objection has applied itself in the course of the argument, is the issue, whether the invention was new as to the public use thereof in England. Now the evidence at the trial which applied itself to this question, consisted of two perfectly distinct heads or classes; the documentary evidence of former patents and specifications, and the parol testimony of the witnesses. It was urged that the present invention was, in the whole, or a material part of it, already known to the public, by the specification to the patent obtained by Hancock which was enrolled in August, 1820, and the specification to the former patent enrolled by Sievier in June, 1832. As to Hancock's patent, it is manifest that if it applied at all to the invention for which the patent now under discussion was taken out, it applied only to the first object stated

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in the specification, all contention as to which object was given up at the trial. But the description in Hancock's patent shews a material distinction between his discovery and that of Sievier. Hancock's patent was taken out for a discovery "of the application of a certain material to certain articles of dress by means of which the same may be rendered more elastic;" and the mode by which this was effected, is described in the specification to be by applying strips of Indian rubber into cases or pipes formed in the article after it was complete. The first object of Sievier's patent, is that of introducing the cords or strands of Indian rubber *between the loops or stitches of the fabric, so as to form a constituent part of the fabric itself. And as to the former patent of Sievier, it was a patent taken out for the making of cables, ropes, whale fishing and other lines, lathe and rigging bands, bags and purses, of filaments or threads of Indian rubber covered with cotton or other materials; the bands and bags were to be knitted, not woven: and there was no attempt to mix with them any non-elastic material to strengthen them, or to form a limit to their elasticity, or for any other purpose. These patents, therefore, do not by any means, as it appears to us, impeach the novelty of the present invention.

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As to the evidence of the various witnesses brought forward on each side at the trial, it must be admitted that there was evidence on both sides. The question raised for the jury was this: Whether the various instances brought forward by the defendants, amounted to proof that before or at the time of taking out the patent, the manufacture was in public use in England, or whether it fell short of that point, and proved only that experiments had been made in various quarters, and had been afterwards abandoned. This question is from its nature one of considerable delicacy; a slight alteration in the effect of the evidence will establish either the one proposition or the other, and the only proper mode of deciding it, is by leaving it to the jury. On the present occasion they heard the evidence patiently, and appeared to apply it with intelligence; and, we can see no reason to be dissatisfied with the conclusion at which they arrived.

With respect to the third ground upon which the rule to shew

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cause was obtained in this case, viz., that since the trial the defendant has discovered a patent taken out by one Desgrand, the patent being sealed in November, 1832,—without entering into the question *whether the invention for which the patent in dispute was taken out, was or was not described in the specification of Desgrand, we think it sufficient to observe, that this specification was not enrolled till May, 1833, whereas the article made under the plaintiff's patent was publicly made and sold upon the London market, to a very large extent in March and April of the same year. And although the specification of Sievier's patent was not enrolled till July, 1833, we think the mere fact of the enrolment of Desgrand's specification after the plaintiff's patent was sealed, and his discovery known upon the market, does not of itself, alone, afford any proof whatever of the want of novelty in the manufacture made under the plaintiff's patent.

We therefore think there is no ground for disturbing the verdict, and that the rule for a new trial must be

Discharged.

1837.
April 24.

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DOE D. RHODES v. ROBINSON.

(3 Bing. N. C. 677—680; S. C. 4 Scott, 396; 3 Hodges, 84; 6 L. J. (N. S.) C. P. 235; 1 Jur. 356.)

A notice to quit given by an agent of an agent, is not sufficient without a recognition by the principal.

EJECTMENT by mortgagee.

At the trial before Coleridge, J., the only question was, whether the person who served the notice to quit had any authority to serve it. The notice was as follows: "I hereby give you notice to quit the possession of the messuages, lands, tenements, and other hereditaments, which you now hold as tenant under the mortgagees in possession of the estates of John Chadwick, situate in Bramhope, in the county of York, or elsewhere, in the said county, at the expiration of your *now current year, and that you leave the same in a tenantable state and condition. Dated this 20th day of July, 1835:" And the person who served it being called as a witness, stated, that he

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had authority from the attorney of the mortgagee to receive and reduce the rents of the mortgaged property; that he had given numerous notices to quit to tenants on that property; and that three or four of them had gone out in consequence.

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The learned Judge thinking that the witness was not sufficiently shewn to have been authorised, a verdict was taken for the plaintiff, with leave for the defendant to move to enter a nonsuit instead.

Wightman having obtained a rule *nisi* accordingly,

Sir G. Lewin, who shewed cause, relied on *Goodtitle v. Woodward* (1), where it was held, that to entitle joint tenants to recover in ejectment against a tenant from year to year, the notice to quit must be signed by all the joint tenants at the time it is served; but if the notice be given by an agent, it is sufficient if his authority be subsequently recognised; and therefore, where such notice was given by an agent under a written authority, which, at the time of the service of the notice had been signed only by some of the several joint tenants, but afterwards was signed by all the others, the subsequent recognition was sufficient to give validity to the authority from the beginning, and that the notice to quit was therefore sufficient. And ABBOTT, Ch. J. said, "the occupier having received notice to quit, purporting to be given on the part of all the lessors of the plaintiff, had then such a notice as he could act upon with certainty at the time it was given. The question is, whether the agent had authority to give the *notice; and I am of opinion that the maxim of law, '*Omnis ratihabitio retrohabetur et mandato æquiparatur*' applies here, and that the subsequent recognition by all the lessors of the plaintiff gives effect to the authority."

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In *Doe d. Mann v. Walters* (2), the Court seemed to think that where notice to quit is given by an agent, the agent ought to have authority at the time the notice begins to operate, and that a subsequent recognition by the landlord is not sufficient. But PARKE, J. said, inasmuch as there was some evidence, though very slight, from which the jury might infer that the agent in

(1) 3 B. & Ald. 689.

(2) 34 R. R. 522 (10 B. & C. 626).

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that case had a previous authority, there should be a rule, not for a nonsuit, but for a new trial.

That case, therefore, did not impugn the authority of *Goodtitle v. Woodward*, which was in accordance with *Doe d. Jolliffe v. Sybourn* (1), and the bringing this action was a sufficient recognition of the notice given.

Wightman, in support of the rule :

It is not proposed to impugn *Goodtitle v. Woodward* : the objection is that the notice was given by an agent of an agent, and that no recognition of it by the principal was proved. There was no evidence of the circumstances under which the other tenants had submitted to the notice, nor was their submission any evidence against the defendant. This goes far beyond any of the decided cases.

TINDAL, Ch. J. :

If we were to allow this verdict to stand without further investigation, we should be carrying our decision beyond any of the cases which have yet appeared ; that is, by holding that a notice by an agent of an agent is sufficient without any evidence of recognition by the principal. There should have been evidence here of an authority to give notice, or of a recognition.

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Some evidence there was, but so little does the matter appear to have been sifted that we think the cause should go down again.

BOSANQUET, J. and COLTMAN, J. concurred.

Rule absolute for a new trial.

LORD v. WARDLE.

(3 Bing. N. C. 680—684; S. C. 4 Scott, 402; 1 Jur. 382.)

1837.
April 25.

[680]

1. When property in land passes by a deed, the property in the deed passes with it.

2. An attorney who draws and attests a deed, conveying land from A. to B., is not allowed afterwards to say that the property in the land and deed did not pass.

3. Where a jury gave a general verdict for defendant on three issues, having been misdirected on one, the Court granted a new trial on payment of costs.

TROVER for a deed purporting to have been made between one Richard Lord, now deceased, of the one part, and the plaintiff, and William Wilkins, of the other part, and purporting to be a conveyance from R. Lord, deceased, to Wilkins, in trust for the plaintiff, of certain premises therein described.

Special damage, that by reason of the conversion of this deed by the defendant, the plaintiff had been hindered from completing the sale of several acres of the premises.

Pleas, first, that the plaintiff was not possessed of the deed as of his own property :

Secondly, that the deed in question was drawn and attested by the defendant, as attorney of R. Lord, deceased, upon his instructions, and to be paid for by him ; that it was a conveyance from R. Lord, deceased, to the plaintiff, his son, to give him a qualification for killing game ; that it remained in the possession of the defendant, as the attorney of R. Lord, deceased, and as part of his muniments ; and that the defendant had a general lien upon it for a debt still due to him from R. Lord, deceased.

Thirdly, that R. Lord, deceased, and the plaintiff, *consented that the deed should remain in the hands of the defendant as a security for the debt due from R. Lord, deceased, to the defendant, and that the defendant should have a lien upon it in respect of that debt.

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The plaintiff joined issue on the first plea, and to the second replied, that the deed was prepared under the instructions of R. Lord, deceased, for the use and benefit of the plaintiff, and in order that it might become the property of the plaintiff, and did not remain in the possession of the defendant, as attorney for

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R. Lord, deceased, and that the charges for the deed were paid before the time of the conversion.

He traversed the agreement set up in the third plea.

The defendant traversed the whole of the replication to the second plea, and joined issue on the replication to the third.

At the trial, before Park, J., it appeared that the deed had been drawn by the defendant, under the instructions of R. Lord, deceased, to give his son, the plaintiff, then a minor, a qualification to kill game: that the deed remained in the possession of the defendant; that, upon one occasion, he had produced it before some magistrates, to establish the plaintiff's qualification; and that the plaintiff ordered it then to be taken back to the defendant, saying, it was agreed between his father and himself that the defendant was to hold the deed till his debt was paid.

The defendant, after the death of R. Lord, made out his bill for drawing the deed, against the plaintiff, then of age; with charges for "attending him and his father," and "attending, as his solicitor, before the magistrates." The plaintiff paid that bill; but a general bill, due from the father, remained unpaid.

[*682] The defendant contended that as this was a voluntary conveyance no property in the land or the deed ever *passed to the plaintiff; and that the defendant's continued possession of the deed, and the plaintiff's language before the magistrates, were evidence of the agreement relied on in the third plea.

The learned Judge, after pointing out what was in dispute upon each issue, told the jury that they were to say whether the deed was intended to pass any interest in the land, and that the main question was, whether the deed belonged to R. Lord, deceased, or to his son. The jury found a verdict generally for the defendant.

Wilde, Serjt. moved to set aside this verdict as against the evidence and for misdirection:

The defendant having attested the deed and produced it before the magistrates, in support of the plaintiff's title, was estopped to say that the land and the deed did not belong to the plaintiff:

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Doe d. Roberts v. Roberts (1), *Brackenbury v. Brackenbury* (2), *Cecil v. Butcher* (3), *Willis v. Robinson* (4): and the agreement set up in the third plea was inconsistent with the assertion that the plaintiff had no interest in the deed. The defendant's delivering his bill to the plaintiff, and the charges contained in the bill, were also evidence that the plaintiff employed the defendant to draw the deed, and that, therefore, it belonged to the plaintiff. If it were the plaintiff's deed, the defendant could claim no lien on it in respect of work done for R. Lord, the father: *Pratt v. Vizard* (5); and it ought not to have been left to the jury, whether it was the deed of the father or the son; nor whether, according to the third plea, the son had ever agreed that the defendant should hold the deed as a security for the debt due from the father: for if he had so agreed, the agreement would have been a responsibility incurred *for the debt of another, and, as such, void under the Statute of Frauds, unless committed to writing.

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A rule *nisi* having been granted,

Goulburn, Serjt. and *Humfrey* shewed cause:

The agreement in the third plea is not an agreement to pay the debt of another, but that the defendant should hold the deed as a security. Of that agreement the plaintiff's language before the magistrates, and the defendant's possession of the deed, was evidence to go to the jury under the third issue; and as the question raised by that issue was pointed out in the summing up, it is no ground for a new trial that there may have been a misdirection upon some other issue. The *postea* may be amended by entering the verdict for the defendant on the third issue only, and giving the plaintiff his costs upon the two first. But the deed conveyed no property to the plaintiff, and therefore was not his. It was only meant to give him an excuse for poaching. In *Ogle v. Story* (6), premises which were mortgaged with a proviso for reconveyance, at the costs of the mortgagor,

(1) 20 B. R. 477 (2 B. & Ald. 367).

(2) 22 B. R. 180 (2 Jac. & W. 391).

(3) 22 B. R. 213 (2 Jac. & W. 565).

(4) 4 Bligh, N. S. 101.

(5) 39 B. R. 660 (5 B. & Ad. 808).

(6) 4 B. & Ad. 735.

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on payment of principal and interest, were sold, and the vendee was to pay off the mortgage on the completion of the purchase; but the mortgagee's attorney, who held the title deeds, would not deliver them to the vendee, till his own bill was also paid. The bill contained some items fairly chargeable on the occasion, as, costs due from the mortgagor and others, which were properly payable by the mortgagee: it was held, that the attorney might enforce his lien on the deeds against the vendee to the whole extent of the bill; and that the vendee having been obliged to pay it for the purpose of releasing the deeds, could not recover back from the attorney the amount unduly charged.

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Wilde, Hill, and Busby, in support of the rule:

The verdict being general, it is impossible to say on which of the issues it is founded, if not on all. The jury should have been called on to distinguish between them, and have been told that the defendant was estopped to say the deed did not belong to the plaintiff.

TINDAL, Ch. J :

In this case there are three issues on which the jury have expressed an opinion, not taking them up severally, which would have been desirable, but giving a general verdict.

As to the first, if the cause were to come on again, I am not disposed to say the verdict ought not to be the other way, because, if the property conveyed passed by the deed in question, the deed itself belongs to the son; and if the first issue has been decided improperly, so has the second; for the father could not give the defendant a lien on a deed which belonged to the son. But on the third issue I am not disposed to quarrel with the verdict.

Strong observations, however, have been made on an expression of the learned Judge who presided at the trial, which expression, if I had been on the jury, I should have confined to the first issue. It is urged that, in giving a general verdict, the jury may have misapplied that expression; and, if so, it is perhaps better that there should be a new trial, not as in an

ordinary case of misdirection, but under the peculiar circumstances, on payment of costs.

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PARK, J. dissented, but

BOSANQUET, J. and COLTMAN, J. concurring, the rule was made

Absolute.

BLATCHFORD v. THE MAYOR, ALDERMEN, AND
BURGESSES OF THE BOROUGH OF PLYMOUTH.

1837.
April 27.

(3 Bing. N. C. 691—708; S. C. 4 Scott, 429; 3 Hodges, 86; 6 L. J. (N. S.)
C. P. 217.)

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Demise of a mill and the stream of water flowing in the leat belonging to the lessor, except so much of the water as should be sufficient for the supply of persons whom the lessor should already have contracted with or should thereafter contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day. Covenant that the lessee should enjoy without interruption of the lessor, or of persons claiming by his act, means, consent, default, privity, or procurement:

Held, no demise of water for twelve hours a day, and that diversions occasioned by contracts previous to the demise were no breach of the covenant for quiet enjoyment.

THE declaration stated that the defendants, by their name of the Mayor and Commonalty of the borough of Plymouth, had demised to the plaintiff, his executors, administrators, and assigns, a certain millhouse and mill used for the grinding of corn and grain, commonly called or known by the Higher Grist Mill, situate, &c., with the appurtenances, together with the use of the stream of water running or flowing in the leat or trench belonging to the defendants, from the northern end of the said demised premises unto the said mill, and the launder in which the same water then ran or flowed, and the flood-hatch, sluices, and other water-works therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, benefit of grinding corn and grain, and all manner of other rights, privileges, advantages, easements, profits, commodities, and appurtenances whatsoever, to the said millhouse, mill, and premises belonging, or in anywise appertaining: excepting and always reserving out of the said demise and grant, unto the

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defendants, their successors and assigns, so much and such part of the said stream of water, running or flowing in the said leat or trench belonging to the defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of Plymouth, and all such bodies politic and corporate, officers and departments in his Majesty's *service, having establishments within or near to the said borough, or other person or persons whomsoever, as the defendants had then already contracted or agreed; or should at any time thereafter contract or agree, to supply with water from their said stream or leat: provided, nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof, for the space of twelve hours, at least, in each and every day of the said term intended to be thereby granted; times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted: also excepting and reserving full and free liberty, licence, and authority for Mary Brodrick, her heirs and assigns, and also to and for the defendants, their successors and assigns, and their respective agents, workmen, and servants, twice in every year during the said term intended to be by the said indenture granted, or oftener if occasion should require, to enter into and upon the said mill-house, mill, dwelling-house, and premises thereby demised, and every part thereof, to view the state and condition of the same, and likewise of the said trench or leat belonging to the defendants; and also excepting and reserving unto the defendants, their successors and assigns, certain fines, penalties, forfeitures, sum and sums of money in the said indenture more particularly mentioned and described:—to have and to hold the said mill, millhouse, &c., with the use of the water running to the said mill and the water-works thereon; and all and singular other the premises in the said indenture before mentioned and described, and thereby demised or intended so to be, with their and every of their customs, liberties, privileges, advantages, members, and appurtenances whatsoever, except as before excepted, unto the plaintiff, his executors, administrators, and assigns, from the *24th of June, 1832, for and during, and unto

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the full end and term of twenty-one years from thence next ensuing, and fully to be complete and ended: the plaintiff yielding and paying, &c. That the defendants, by their then name of the Mayor and Commonalty, did thereby for themselves, their successors and assigns, covenant, promise, and agree to and with the plaintiff, his executors, administrators, and assigns, that the said plaintiff, his executors, administrators, and assigns observing and performing the several covenants and agreements hereinbefore contained, by him and them to be observed and performed should, and lawfully might, peaceably and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, waterworks, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever, of or by the said M. Brodrick, her heirs, executors, administrators, and assigns, or of or by the defendants, their successors or assigns, or any other person or persons whomsoever, rightfully claiming or to claim, by, through, under or in trust for them, any or either of them, or by their, any, or either of their acts, means, consent, default, privity, or procurement. Breach,—that though the plaintiff had always, from the time of the making the said indenture hitherto, well and truly paid the said rent by the said indenture reserved on the days and in the manner in the said indenture appointed for payment thereof, and observed, performed, fulfilled, and kept all things in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the tenor and effect, and true intent and meaning of the said indenture, yet the defendants, on the 31st of March, 1833, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and took, and *caused and procured to be drawn and taken, from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream, which, on those days, was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, nor any times of needful

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reparation or cleansing of the said trench or leat, or any breaking of the banks thereof required the drawing or taking thereof: and the defendants, on those days and times, wrongfully and injuriously hindered, denied, molested, and interrupted the plaintiff in the use of the said millhouse, mill, and machinery, whereby the plaintiff, during all the time aforesaid, was hindered and prevented from working the said mill, and had lost and been deprived of divers great gains and profits which would otherwise have arisen and accrued to him from the working of the said mill.

The defendants pleaded that they did not wrongfully and injuriously draw and take, or cause and procure to be drawn and taken, from and out of the said stream, the said quantities of the water thereof in the declaration mentioned, or any part thereof, although the residue of the water of the said stream which, on the said days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours on any or either of the said days, although no casualty of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof required the drawing or taking thereof; nor did the defendants wrongfully and injuriously hinder, deny, molest, or interrupt the plaintiff in the use of the said mill-house, mill, or machinery in manner and form as the plaintiff had above alleged; and of that, the defendants put themselves upon the country, &c.

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At the trial before Alderson, J., Devon Summer Assizes, 1886, it was admitted that since the execution of the lease the defendants had done no act in the way of diversion to lessen the quantity of water in the leat. And it appeared that previously to the execution of the lease, and at the time of the action, there were no less than eight outlets by which the water of the leat was diminished. Six of these were called ox eyes, that is, streams passing through holes in stone or wood of the size of an ox's eye; two of them—a flood hatch to Meavy Mill, and a stream to the Government Victualling Office—were of a considerable size.

The outlet to Meavy Mill, which was mentioned in the recital of the lease, existed at the time of passing the stat. 27 Eliz. c. 21, by which power is given to the Mayor and Commonalty of

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Plymouth, and their successors, to dig a ditch or trench six or seven feet over in all places, over all grounds lying between the river Mew or Meavy, for the convenient or necessary conveying of the said river to the said town; and at the end of that statute is a proviso "that nothing in the Act should extend to give liberty to bring the said water, or any part thereof, out of its ancient course, unless every such person and persons as were owners of any mill or mills, situate and standing upon or near the said river Mew or Meavy should first be compounded with, if the said mill by the bringing of the said water or any part thereof, into the said town of Plymouth be impaired or injured:" and the stream to the Government Victualling Office was authorised by stat. 5 Geo. IV. c. 49, by which, after reciting that the mayor and corporation were willing to furnish water to the Victualling Office, it is enacted, s. 3, that "the said Mayor and Commonalty shall, and they are hereby required to convey from the said stream or leat, by a sluice or such other ways and means as they may judge *proper, a supply equal to 400 tuns daily, of pure wholesome fresh water into the said reservoir of the said commissioners, to be from thence conveyed and apportioned and distributed among the different departments of the said victualling establishment at Cremill Point, and the naval hospital aforesaid, in such manner as the said commissioners shall think fit;" "in consideration whereof, the said Mayor and Commonalty and their successors, shall be entitled to, and shall have and receive a net annual rent or sum of 250*l.*, free and clear of any deduction."

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It was admitted that one of the eight streams had been supplied to a house for upwards of 180 years at an annual payment of 1*l.* 1*s.*; two, for upwards of 100 years without payment; and a third, without payment, for several years before the lease to the plaintiff. Two others had, for several years before the lease, been supplied to tanyards, one at 10*l.* 10*s.* a year, the other at 6*l.* 6*s.* And 400 tuns daily had been supplied to the Victualling Office under 5 Geo. IV. c. 49, at a rent of 250*l.* a year. It was proved that at some seasons there was not water enough to work the plaintiff's mill for twelve hours a day.

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PLYMOUTH. A verdict was found for the plaintiff, with leave for the defendant to move to set the verdict aside and enter a non-suit instead, upon the construction of the covenant for quiet enjoyment. Accordingly,

Sir W. Follett obtained a rule *nisi* to that effect, contending, that as things had all along remained precisely in the state they were in at the time of the lease, there was no act of the defendants that could be styled a breach of the covenant for quiet enjoyment.

[After argument:]

[701] TINDAL, Ch. J. :

This is an action on a covenant for quiet enjoyment of a mill with the appurtenances, described in the lease on which the plaintiff sues; and the objection taken by the defendants is, that the subject-matter, in respect of which the plaintiff sues, did not pass by the grant, and that even if it did, upon the breach which has been assigned, the plaintiff is out of Court. The questions, therefore, to be decided are two: first, whether the water, the diversion of which is the subject of the plaintiff's action, passed by the demise from the defendants. The property demised is described as "the higher grist mill, with the appurtenances, together with the use of the stream of water running or flowing in the leat belonging to the defendants, from the northern end of the demised premises unto the said mill, and the launder in which the same water then ran, and the flood hatch, sluices, and other water works therein, together with all erections, buildings, walls, fences, ways, paths, passages, toll, custom, benefit of grinding corn and grain, and all and all manner of other rights, privileges, advantages, easements, profits, commodities and appurtenances whatsoever to the said mill and premises belonging or appertaining." If the description had gone no further,—if there had been no exception or proviso,—I should have said that the intention was to pass the mill, and also the use of the stream of water as it was then running *at the date of the lease. If that were so, as nothing has been done since

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the lease, the plaintiff would have no ground of action. But it is contended that if we look to the exception and proviso following it, we shall collect that it was the intention of the defendants to grant the water for twelve hours daily. The terms of the exception are,—“excepting and always reserving out of this present demise and grant, unto the defendants, their successors, and assigns, so much and such part of the said stream of water running or flowing in the said leat or trench belonging to the defendants, as should be sufficient for the supply of such and so many of the inhabitants of the town and borough of Plymouth, and all such bodies politic and corporate, officers and departments in his Majesty’s service, having establishments within or near to the said borough, or other person or persons whomsoever, as the defendants had then already contracted or agreed, or should at any time thereafter contract or agree to supply with water from their said stream or leat.”

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If that exception had stood alone, it would have been void as repugnant to the grant, and as enabling the lessor to take away all he had granted.

There is, therefore, the following proviso, “Provided nevertheless, that such a quantity of water should be always left to flow to the said mill as should be sufficient for the due working thereof for the space of twelve hours at least in each and every day of the said term intended to be thereby granted,—times of needful reparation and cleansing the said trench or leat, the breaking of the banks thereof, and casualties of fire and frost only excepted.”

The effect of this is to limit the lessors as to the future. The lessors knew what was already granted; the lessors stipulate that they may grant more; but the lessees insist that, notwithstanding any such grant, sufficient *shall be left to flow twelve hours a day. There is, therefore, no stipulation or absolute grant of twelve hours’ water, but merely that, in case of any further grant, twelve hours’ water shall be left. If so, is the plaintiff or not out of Court upon this demise? “To have and to hold the said mill, mill-house, mill machinery, implements and utensils, dwelling house, stable, garden and close of land, with the use of the water running to the said mill, and the

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waterworks thereon, and all and singular other the premises in the said indenture before mentioned and described, and thereby demised or intended so to be, with their and every of their customs, liberties, privileges, advantages, members, and appurtenances whatsoever, except as before excepted, unto the plaintiff, his executors, administrators, and assigns, from the 24th of June, 1892, for and during and unto the full end and term of twenty-one years."

It seems to me that the deficiency of daily supply does not give a cause of action upon this demise, inasmuch as there is no grant of the quantity insisted on.

But, secondly, assuming that there has been a demise of this quantity, has there been any breach of the covenant for quiet enjoyment? That covenant is, "that the said plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements hereinbefore contained by him and them to be observed and performed, should, and lawfully might, peacefully and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, waterworks, and all and singular other the premises intended to be thereby demised with their appurtenances, for and during the full and complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever of or by the said M. Brodrick, her heirs, executors, administrators, or assigns, or of or by the defendants, their successors *or assigns, or any other person or persons whomsoever, rightfully claiming or to claim by, through, under or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement."

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By this covenant three classes of acts are guarded against: acts of the defendants individually; acts of persons claiming under them; and acts occasioned by their means or default. The breach assigned is, that "the defendants, on the 31st of March, 1893, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew, and took and caused and procured to be drawn and taken, from and out of the said stream, divers large quantities of the water thereof, although the residue of the water of the said stream,

which, on those days, was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours on any or either of those days, although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof required the drawing or taking thereof: and the defendants, on those days and times wrongfully and injuriously hindered, denied, molested, and interrupted the plaintiff in the use of the said mill-house, mill, and machinery.”

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The evidence was, not that defendants had done or had procured any act to be done since the execution of the lease; it was admitted they had done nothing since that period; but it was shewn that persons, having rights under prior grants, had diminished the quantity of water that might otherwise have flowed to the plaintiff's mill. That evidence would only have suited a breach that persons, having prior title under the defendants, had impaired the plaintiff's enjoyment; but it does not fall within the triple condition of this covenant *for quiet enjoyment. In Com. Dig., Pleader, 2 V. 2, it is laid down that “the breach ought to be co-extensive with the import and effect of the covenant.”

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It is unnecessary for us to enter into the consideration of the effect of the two local Acts of Parliament, because, on the grounds already mentioned, this rule ought to be made absolute.

PARK, J. concurred.

BOSANQUET, J. :

There are two questions in this case: one, as to the construction to be put on the demise from the defendants; the other as to the propriety of the breach of covenant which the plaintiff assigns. The first, which regulates the contract, is the most material. On the part of the plaintiff it is contended that the effect of the whole instrument is a demise of so much water as will supply the mill for twelve hours a day. But I think that such is not the true construction. The demise is of the mill with its appurtenances, and the use of the water running in the leat: then comes the exception, which reserves to the defendants

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so much of the water as they had then contracted or should thereafter contract to supply to the inhabitants of the town, the Victualling Office, or any other persons. The effect of the exception, if it stopped there, would be altogether derogatory to the grant. But then comes the proviso, that such a quantity of water should be left to flow to the mill as should be sufficient to work it for twelve hours a day.

That proviso is to be applied as a limit to what the defendants are to do in future: they are not to be allowed by any act subsequently to the lease to reduce the supply to less than enough for twelve hours: but if the stream did not supply that quantity before, the proviso is not a grant or engagement that such shall *be the quantity demised. If this be the true construction of the deed there is an end of the plaintiff's claim.

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But supposing it to be doubtful, can the plaintiff recover on this alleged breach of the covenant for quiet enjoyment? The plaintiff contends he is entitled to recover by reason of acts prior to the lease, and he insists that supplies from the stream taken by authority, of local statutes, are to be considered as acts for which the defendants are responsible. It is unnecessary to enter into the question on the statutes, because persons have been supplied with water independently of the provisions of those statutes, and if any one has been supplied improperly, the plaintiff would be entitled to recover, if the twelve hours' water was parcel of the grant, and if there has been a breach of the covenant for quiet enjoyment. That covenant is, "that the said plaintiff, his executors, administrators, and assigns, observing and performing the several covenants and agreements hereinbefore contained by him and them to be observed and performed, should and lawfully might peaceably and quietly have, hold, use, occupy, and enjoy the said mill-house, mill, waterworks, and all and singular other the premises intended to be thereby demised, with their appurtenances, for and during the complete term of twenty-one years thereby granted, without any lawful hindrance, denial, molestation, or interruption whatsoever, of or by the said M. Brodrick, her heirs, executors, administrators, or assigns, or of or by the defendants, their successors, or assigns, or any other person or persons whom-

soever rightfully claiming, or to claim by, through, under, or in trust for them, any or either of them, or by their, any or either of their acts, means, consent, default, privity, or procurement." And the breach assigned is, not that certain persons claiming under contracts prior to the demise, and by the authority of the defendants have disturbed the *plaintiff in his enjoyment; but that "the defendants on the 31st of March, 1893, and on divers days between that day and the commencement of this suit, wrongfully and injuriously drew and took, and caused and procured to be drawn and taken, from and out of the said stream divers large quantities of the water thereof, although the residue of the water of the said stream which on those days was left to flow to the said mill, was not sufficient for the due working thereof for the space of twelve hours on any or either of those days; although no casualties of fire or frost, nor any times of needful reparation or cleansing of the said trench or leat, or any breaking of the banks thereof required the drawing or taking thereof: and the defendants on those days and times wrongfully and injuriously hindered, denied, molested, and interrupted the plaintiff in the use of the said mill-house, mill, and machinery." Now it is clear upon the evidence that nothing has been done to alter the state of the water since the demise: the form of the breach does not touch the subject of complaint: for if the plaintiff meant that he was injured by contracts entered into by the defendants previously to the demise, the breach should have been framed accordingly.

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COLTMAN, J. :

It would be sufficient to decide the cause on the point that the breach has not been properly assigned, inasmuch as the disturbance was not occasioned by the parties who are alleged to have committed it; but it is just towards the parties to express our opinion on the substantial question in the cause, which is, whether water has been drawn off that ought to have flown to the mill. The contract as construed by the plaintiff, is not one which it is likely the defendants would have entered into; it implies an abandonment of all their previous contracts, if

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they chanced to fail in furnishing *a twelve hours' supply of water to the plaintiff; but we cannot rely on that, as it might be importing facts into the case which are not stated in the deed. Therefore looking to the deed, the point is, what was the subject of the grant? The grant is, of the mill, and the use of the water, without any reference to quantity; and the exception and proviso cannot enlarge the grant.

The deed is inartificially drawn, and the exception of what was thereafter to be let to others, as well as of what had before been let, was sufficient to raise a doubt; but the subject of the grant to the plaintiff was, the use of the stream as flowing at the time of the demise. As nothing has been done to derogate from that grant, the plaintiff has had all that he was entitled to, and therefore this rule must be made

Absolute.

1837.
April 28.
[717]

GOWER AND OTHERS v. VON DEDALZEN AND
ANOTHER (1).

(3 Bing. N. C. 717—724; S. C. 4 Scott, 453; 3 Hodges, 94; 6 L. J. (N. S.)
C. P. 198; 1 Jur. 285.)

To an action for not performing a contract to purchase a cargo of good merchantable Gallipoli oil, being the cargo of the vessel *Fortuna*, then on her voyage, the cargo consisting of L. R. 240 casks, containing 901 salmes, at 54*l.* per ton of 7½ salmes, defendant pleaded, that the casks containing the oil were not, at the time of the contract, good merchantable casks: Held, ill.

THE declaration stated that it was mutually agreed by and between the plaintiffs and defendants that the plaintiffs should sell to the defendants, who should buy of and from the plaintiffs, a certain cargo of good merchantable Gallipoli oil, then being the cargo of the vessel *Fortuna*, and which vessel was then on her voyage from Gallipoli to Falmouth or Plymouth, (the said cargo consisting of L. R. 240 casks, containing 901 salmes and 9 pignatelles), at 54*l.* per imperial ton of 7½ salmes, which

(1) The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), does not (s. 14) deal specifically with the point of this case. Most of the cases as to implied warranty are collected in

the arguments and judgment in *Jones v. Just* (1868) L. R. 3 Q. B. 197, 37 L. J. Q. B. 89; and in *Randall v. Newson* (1877) 2 Q. B. Div. 102. 46 L. J. Q. B. 259, 36 L. T. 164.—R. C.

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amounted in the whole to a large sum of money, to wit, 6,755*l.* 17*s.* 2*d.*, payable by cash, less 2½ per cent. discount, and which discount then amounted to a large sum of money, to wit, 168*l.* 18*s.* 5*d.* on delivery of bill of lading on her arrival at Plymouth or Falmouth, to either of which ports the plaintiffs agreed to pay freight, insurance, and gratuity, &c. &c. That, after the making of the said agreement and promise respectively, and before the commencement of this suit, to wit, on the 4th of March, 1836, the said vessel, called the *Fortuna*, arrived on her said voyage from Gallipoli at Plymouth aforesaid, and, at the time of such arrival had on board a cargo of good merchantable Gallipoli oil, consisting of L. R. 240 casks, containing 901 salmes and 9 pignatelles, being the said cargo in the said agreement hereinbefore mentioned; whereof the defendants had notice: that thereupon, and within a short and reasonable time in that behalf, after such arrival at Plymouth aforesaid, of the said vessel as aforesaid, the plaintiffs tendered and offered to deliver to, and leave with, the defendants, a certain *bill of lading of the said cargo, being the bill of lading in the said agreement hereinbefore mentioned, upon the defendants paying the aforesaid price of the said cargo in manner aforesaid; that the plaintiffs were then ready and willing to pay, and did in point of fact pay the said freight, insurance, and gratuity in the said agreement hereinbefore mentioned to be payable by them; and were then ready and willing, and offered to the defendants to deliver to them, and requested them to accept and receive the said cargo at Plymouth aforesaid, upon the defendants paying to the plaintiffs the aforesaid price thereof, in manner aforesaid, &c. Breach: That the defendants did not nor would, when so requested as aforesaid, or at any other time take, accept, or receive the said bill of lading or cargo at Plymouth aforesaid, or direct the said vessel with the said cargo to any one of the ports before mentioned, or pay to the plaintiffs for the same cargo the aforesaid price in manner or with the deduction and discount aforesaid, or any part thereof, but then wholly neglected and refused so to do; whereupon, and after the lapse of a reasonable time in that behalf, after such respective offers and refusals as aforesaid, to wit, on the 4th of May, 1836, the plaintiffs sold

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and disposed of the said cargo by public auction, having theretofore, to wit, on, &c. given due notice to the defendants of the plaintiffs' intention so to do, to the best bidders and buyers that could be got for the same, at a much less price than the said price in the said agreement hereinbefore mentioned, deducting therefrom such discount as aforesaid, to wit, for the price and sum of 5,555*l.* 14*s.* 6*d.*, being less than the said price, deducting therefrom such discount as aforesaid, by a certain large sum of money, to wit, 1,032*l.* 4*s.* 4*d.*, which last mentioned sum then became, and was thereby wholly lost to the plaintiffs; and they were then necessarily forced and obliged to *pay, lay out, and expend, and did pay, lay out, and expend, in and about the unloading, selling, and disposing of the said cargo 266*l.* 9*s.* 9*d.*

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The defendants, in their seventh plea, alleged, that the said casks containing the said oil, in the said agreement and declaration mentioned, were not at the time of the making of the said agreement and promise, in the declaration mentioned, or at the time of the arrival of the vessel at Plymouth, or at the time the plaintiffs tendered and offered to deliver to and leave with the defendants the said bill of lading of the said cargo, as in the declaration mentioned, well-seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the said agreement in the declaration mentioned, but, on the contrary thereof, were badly seasoned and unfit and improper casks for the purpose of containing such oil as in the said agreement mentioned; wherefore the defendants did not nor would take, accept, or receive, the said bill of lading and cargo at Plymouth aforesaid, and did not nor would direct the said vessel, with the said cargo, to any one of the ports in the declaration mentioned, and refused to pay to the plaintiffs for the said cargo the said price, in manner and form as in the declaration alleged.

Special demurrer—assigning for causes, that the defendants had not, by the above plea, traversed, or attempted to put in issue, any matter of fact alleged, or necessary to be alleged, by the plaintiffs in their declaration, but had introduced, and attempted to put in issue, a matter of fact not alleged,

or necessary to be alleged, viz., the fact whether the casks containing the said oil were, at the several times mentioned in the plea, well-seasoned or proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms and within the true intent and meaning of the *said agreement, without in their said plea shewing or making it in any way appear that the sufficiency or good quality of the said casks was either expressly, or by necessary implication, warranted, or contracted, or agreed for, by the plaintiffs in their said agreement, in the declaration mentioned: that, if it were the intention of the defendants, by and under their said plea, to set up any usage or custom, by which the sellers of Gallipoli oil, under the circumstances in the declaration mentioned, were or could be held, even without any express agreement to that effect, to warrant, or contract, or agree for the proper quality and sufficiency of the casks in which the same might be contained, to the purchasers thereof, they should have expressly alleged the existence of such usage or custom, and that the said contract was made with reference and subject thereto: that it was not alleged in the plea, nor did it in any way appear therein, that the oil was at all damaged or rendered unmerchantable, within the meaning of the agreement, by reason of the premises in the plea mentioned, and, therefore, that the plea offered no justification or excuse for the non-performance by the defendants of their part of the said contract, and was no answer to the declaration, but was evasive and argumentative, and any issue raised thereon would be immaterial: that the defendants, in their said plea, had not only alleged and attempted to put in issue the insufficiency and bad quality of the casks at the time of the making of the said agreement, but also at the time of the arrival of the said vessel, and of the tender of the cargo, as in the declaration mentioned; although it was quite immaterial, and irrelevant to the purposes of this action, what the state of the said casks happened to be at any other time than that of the making of the agreement, unless the defendants had alleged in their plea, which they had not done, that the insufficiency and bad quality of the casks at the time of

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the said arrival, and of the said *tender, respectively, had been caused and occasioned by the default of the plaintiffs: that the defendants did not, in and by their said plea, allege that the said casks were intrinsically and in themselves of any less value, by reason of their said insufficiency and bad quality, than they otherwise would have been, or that the defendants would have sustained any damage in respect thereof by reason of their accepting the cargo; and that the plea did not allege that the defendants elected to avoid, or gave to the plaintiffs any notice of their intention to avoid the said contract or agreement, by reason of the premises in the plea mentioned or otherwise.

Joinder.

Crowder, in support of the demurrer, relied on the objections above set forth.

Maule, for the defendants, contended that the contract was not for the sale of a given quantity of oil, but of a certain number of casks of oil; casks described as containing oil. The subject-matter of the contract was as well casks as oil, for the casks were described by their marks. The casks, therefore, ought to be of a merchantable quality as well as the oil: for every vendor impliedly warrants that the article he sells shall reasonably answer the purpose for which it is sold: *Gray v. Cox* (1), *Jones v. Bright* (2). If the casks were not of a merchantable quality the purchaser has not got all that he bargained for, and the plea is sufficient.

Crowder :

[*722] It is the cargo of oil which is sold, the quantity of which is specified; and the whole is to be paid for by the ton, not by the cask: nothing is said about the payment for the casks; which, like the ship, *are a mere vehicle for conveying the oil; as bags for conveying wool. They are a mere accident, and not of the essence of the contract. *Jones v. Bright*, *Gray v. Cox*, *Bridge v. Wain* (3), and other cases of a like nature, relate to the article

(1) 4 B. & C. 108.

(3) 18 R. R. 815 (1 Stark. 504).

(2) 30 R. R. 728 (5 Bing. 533).

which was of the essence of the contract. But in *Parkinson v. Lee* (1), upon a sale of hops by the sample, with a warranty that the bulk of the commodity answered the sample, it was held that the law did not raise an implied warranty that the commodity should be merchantable; though a fair merchantable price was given: and, therefore, if there had been a latent defect then existing in it, unknown to the seller, and without fraud on his part (but arising from the fraud of the grower from whom he purchased) such seller was not answerable, though the goods turned out to be unmerchantable.

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TINDAL, Ch. J.:

I am of opinion that the seventh plea is no answer to the plaintiffs' right of action. The contract in the declaration is, that the plaintiffs should sell to the defendants, and the defendants buy of the plaintiffs, a cargo of good merchantable Gallipoli oil: all the rest is matter of description only. In answer to the plaintiffs' claim, the defendants do not deny that the cargo was of good merchantable Gallipoli oil; but they take an objection to something that is mere matter of description, and not of the essence of the contract; namely, that the plaintiffs were not ready to deliver well seasoned and proper casks for the purpose of containing good merchantable Gallipoli oil, according to the terms of the agreement. If such a plea were available, it is evident that a single imperfect cask would sustain the objection, and yet not make the slightest difference in the defendants' situation. I can conceive cases in which the state of the receptacle of the *article sold, might furnish a defence; as, if it were a pipe of wine in bottles, with the cork of every bottle oozing: but in such a case the plea would be that the wine was not in a merchantable state. Here, the plea going to what is matter of description only, and not of the essence of the contract, our judgment must be for the plaintiffs.

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PARK, J.:

This was a contract for a cargo of good merchantable Gallipoli oil, and not a contract for well seasoned casks. The casks are

(1) 6 R. R. 429 (2 East, 314).

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only an adjunct. In the cases referred to, the commodity itself, which was the subject of the contract, was not of a merchantable quality.

BOSANQUET, J.:

The seventh plea is no answer to the action. The contract appears to be for the sale of good merchantable Gallipoli oil, at so much per ton, being the cargo of the ship *Fortuna*. It must be packed up in some way, and contained in something; and it is described as contained in 240 casks. The plea then alleges that the *Fortuna* arrived, and had on board the oil as described in the declaration; being the cargo sold. The circumstance that some of the casks were defective, is no answer to the action. Even if all the casks had been defective in some respects, as in the loss of a hoop or two, and some of the oil had escaped, it would have been no answer, unless the oil had been injured, because it does not go to the essence of the contract. Suppose a contract for a number of bales of cotton of a given quality: the bales arrive, and the cotton is of the quality required; it would be no answer to an action for the price, to say that some of the bales were rent. It would be of serious consequence, if we were to hold that every defect in the recipient vessel would entitle a purchaser to avoid his contract for the commodity contained in it.

[724] COLTMAN, J.:

This plea is no answer to the declaration, because it does not go to the whole of the consideration. It was a sale of oil: but supposing it had been a sale of casks also, if the oil be of the proper quality and quantity, the objection goes only to part of the consideration.

Judgment for the plaintiffs.

YOUNG v. COLE.

(3 Bing. N. C. 724—732; S. C. 4 Scott, 489; 3 Hodges, 126; 6 L. J. (N. S.) C. P. 201; 1 Jur. 22.)

1837.
April 29.

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Plaintiff, a stock-broker, sold for defendant four Guatemala bonds, and paid him the amount: the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable; whereupon plaintiff took them back and reimbursed the purchaser:

Held, that plaintiff was entitled to recover from defendant, in an action for money had and received, the amount he had paid to defendant.

ACTION for money paid by the plaintiff to the use of the defendant, and for money had and received by the defendant to the use of the plaintiff.

The plaintiff, a stock-broker, was employed by the defendant in April, 1836, to sell for him four Guatemala bonds, of 245*l.* each.

The plaintiff, in three or four days, sold them to Briant for 300*l.*, and deducting 1*l.* 5*s.* for his commission, paid the defendant 298*l.* 15*s.*

Briant, who was conversant with the usages of the Stock Exchange, kept the bonds two days, and then sold them again.

The bonds in question were not stamped. But,

In 1829 the Guatemala Government had issued an order, which was advertised in the London newspapers, requiring the holders of such bonds to produce them, and have them stamped by an agent of that Government within a certain time; in default of which they would not be recognised by the state. Evidence of the advertisement was offered and rejected: but it was proved *that since that time, unstamped Guatemala bonds were not a marketable commodity on the Stock Exchange.

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Upon that ground, Briant's vendee soon returned the bonds in question. Briant, representing the matter to the plaintiff, the plaintiff, without communicating with the defendant, or returning the bonds, refunded what Briant had paid him, and now sought to recover the amount which he had himself paid over to the defendant.

The defendant, upon being applied to, wrote to say that he was agent only as to a part of the bonds; but that if the payment had been made for his own part, he would desire his clerk to reimburse the plaintiff. At the trial he did not shew that all the bonds were not his.

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The plaintiff could find no one in this country who had authority now to stamp the bonds; but one witness said he had procured a stamp to bonds of the same description.

Both parties, at the time of the transaction, were ignorant that a stamp was necessary. It was proved that brokers on the Stock Exchange do business as principals, in dealing with foreign stock, and are liable to be expelled if they do not make good their differences. The defendant's name was not mentioned by the plaintiff to Briant.

On behalf of the defendant, it was objected at the trial before Tindal, Ch. J., that under these circumstances the plaintiff could not recover on the declaration for money paid or money had and received; but should have declared specially on the implied warranty by the defendant that the bonds he offered for sale were marketable bonds. Whereupon,

A verdict was taken for the plaintiff for the amount the defendant had received from him; with leave for the defendant to move to set the verdict aside and enter a nonsuit instead.

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Sir F. Pollock accordingly moved the Court to that effect, urging, that after Briant had kept the bonds for a length of time sufficient to enable him to decide whether he would make them his own or not, and had actually sold them to a third person, the plaintiff had no right to call on the defendant for a payment which the plaintiff was not compellable to make; at all events, not unless he had apprized the defendant of what he was about to do, and had returned the bonds so as to have afforded the defendant the opportunity of replacing them with stamped instruments. In *Street v. Blay* (1) it was held, that a person who had purchased a horse warranted sound, sold it again, and then repurchased it, could not, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor could he, by reason of the unsoundness, resist an action by such vendor for the price.

Wilde, Serjt. and *Ogle* shewed cause :

The plaintiff was a member of the Stock Exchange, and

(1) 36 B. R. 626 (2 B. & Ad. 456).

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subject to the rules of that society, one of which was that in affairs of this nature he could only deal as a principal. The defendant, therefore, when he entrusted the plaintiff to sell the bonds, gave him an implied authority to do all that a principal was bound to do. Just as in the case of a *Del credere* commission: *Grove v. Dubois* (1). In *Child v. Morley* (2) where the broker acted as agent only, it was held he could not make good the difference on failure to complete a contract for the sale of stock, without consulting his principal. But here the plaintiff was himself the principal upon the Stock Exchange, and bound to refund to Briant when the bond turned out to be unmarketable. He was *under a responsibility from which he had a right to relieve himself at the expense of the defendant, if he was placed in that situation for the benefit, and at the instance of the defendant. Thus in *Fisher v. Fallows* (3), it was held that where a person became bail for another, he was entitled to recover all the expenses he had been put to in consequence, and might therefore recover expenses incurred in sending after the principal to take him, in order to render him. Here, too, the plaintiff was entitled to recover on the count for money had and received, the consideration on which the defendant received the money having totally failed. Thus in *Wilson v. Milner* (4) where a bailiff who had levied money under an execution paid it over to the execution creditor, but was afterwards himself obliged to pay the amount to the assignees of the party against whom the execution had been sued out, he having committed an act of bankruptcy before the execution, it was held that the bailiff might recover the amount from the execution creditor, in an action for money had and received. The same principle was recognised in *Austin v. Ward* (5), and *Lucas v. Worswick* (6). But the defendant's letter is a ratification of what the plaintiff has done; for he promised to refund, as to the bonds which were his own property; and as he failed to prove at the trial that he held any of them as agent, the whole must be taken to be his own. In *Remon v. Hayward* (7),

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(1) 1 T. R. 112; see 16 R. R. 664, n.

(5) Ry. & Moo. 116.

(2) 8 T. R. 610.

(6) 42 R. R. 798 (1 Moo. & Rob.

(3) 8 R. R. 843 (5 Esp. 171).

293).

(4) 2 Camp. 452.

(7) 2 Ad. & El. 666.

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the defendant had signed a paper, admitting that he held money for the plaintiff to be put into a saving bank, and having failed to prove such application of it, the plaintiff was held entitled to recover. As to the objection that the plaintiff omitted to return the bonds, the case is not like that of an article which may be worth something; these bonds were not recognised in the market, *and were worth nothing. The plaintiff, therefore, was entitled to recover the full amount, as in the case of any other article which turns out not to be what the seller described it: *Gardiner v. Gray* (1), *Bridge v. Wain* (2), *Jones v. Ryde* (3). In *Street v. Blay*, the plaintiff made a profit out of the horse which he complained was unsound, and it was not returned upon his hands, but repurchased by him at a great advantage.

F. Robinson, in support of the rule :

If the plaintiff had been compellable to pay Briant, he might perhaps have had a right to sue the defendant. He ought, however, before paying Briant, to have resorted to the defendant, and have given him an opportunity of settling on his own terms. But the plaintiff was not compellable to pay Briant, for Briant saw the bonds before he purchased them, and was conversant with the usages of the Stock Exchange; unless, therefore, the bonds were waste paper, he could not have recovered the money back from the plaintiff. Now, though since 1828, none but stamped Guatemala bonds had been sold in the market, yet the obligors were not exonerated on the unstamped bonds, and one witness said he had procured a stamp: they were therefore of some value; and, though the plaintiff may be entitled to recover of the defendant upon his implied warranty that the bonds were marketable bonds, he cannot recover in this form of action. In *Jones v. Ryde*, what had been transferred as a navy bill, being a forged instrument, was mere waste paper. In *Bridge v. Wain* and *Gardiner v. Gray*, what had been sold as scarlet cuttings and waste silk, was not scarlet cuttings and waste silk; and in *Wilson v. Milner* and *Fisher v. Fallows*, the plaintiffs respectively were compelled to pay the sum they sought to recover of the

(1) 16 R. R. 764 (4 Camp. 144).

(3) 15 R. R. 361 (5 Taunt. 488).

(2) 18 R. R. 815 (1 Stark. 504).

defendant. But *Street v. Blay* shews *that the contract of the plaintiff with Briant was one that could not be rescinded. Lord TENTERDEN says, "Lord ELDON, in the case of *Curtis v. Hannay* (1), is reported to have said, that 'he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, in which he would have a right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of the warranty; or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value;' and he proceeds to say, that if it were in a worse state than it would have been if returned immediately after the discovery, the purchaser would have no defence to an action for the price of the article. It is to be implied that he would have a defence in case it were returned in the same state, and in a reasonable time after the discovery. This *dictum* has been adopted in Mr. Starkie's excellent work on the Law of Evidence, part iv. p. 645; and it is there said that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right upon the breach of the warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed; but must sue upon the warranty, unless there has been a condition in the contract, authorising *the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud, which destroys the contract altogether." In *Gompertz v. Denton* (2), it was held, that the purchaser of a horse could recover for breach of a warranty

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(1) 3 Esp. 83.

(2) 1 Cr. & M. 207.

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in an action for damages only, and could not sue for money had and received, as on a failure of the original consideration, unless there was a stipulation in the original agreement for rescinding the contract in such event, or unless the case were one of fraud. The same principle is recognised in 1 Wms. Saund. 269 b, note. Briant, therefore, having had an opportunity of inspection, there was no implied warranty on the part of the plaintiff: *Parkinson v. Lee* (1), *Gardiner v. Gray*; and if there was any warranty by the defendant, the plaintiff should have chosen a different form of action.

TINDAL, Ch. J.:

It appears to me that the sum for which the verdict has been given, is properly called money received by the defendant to the use of the plaintiff. The money which the plaintiff delivered to the defendant was his own money, for he had sold the bonds as a principal to Briant, and was subject to all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were saleable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value.

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The remaining question is, whether the plaintiff had *a right to rescind the contract he had entered into with Briant. It is to be observed that in that contract the defendant's name was never used; there was no contract between him and Briant; the plaintiff was the only person known to Briant. But stopping short of that, the universal custom of the Stock Exchange would authorise the plaintiff to rescind the contract without consulting the defendant; and the defendant has been in no respect damaged by what the plaintiff has done.

There is, however, another ground on which the verdict stands

(1) 6 B. E. 429 (2 East, 314).

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clear of objection; that is, that after the defendant was aware of all that had been done, he wrote to say that if the bonds were his own, he would send his clerk to pay the plaintiff the amount. Having omitted at the trial to shew that he held them in the capacity of agent, as he had asserted, his letter is a ratification of what the plaintiff had done, and the verdict ought not to be disturbed.

PARK, J. concurred.

BOSANQUET, J. :

I agree in the principle of the cases which have been cited as to breach of warranty, but this is not a case of that description. Here, no consideration has been given for the money received by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock Exchange, worthless paper; and the payment made by the plaintiff to Briant was not voluntary. According to the principle established by *Child v. Morley*, the defendant was bound to reimburse the plaintiff what he was thus compelled to pay. For it appeared to be the custom of the Stock Exchange, that in these cases the broker is treated as principal, and liable to be expelled if he does not make good his differences. Upon either of the counts, therefore, the plaintiff may sustain this *action. And even upon the defendant's letter, unless he shewed the bonds not to have been his own, the plaintiff is entitled to retain the verdict.

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COLTMAN, J. :

I am of the same opinion. The first question is, whether the plaintiff was entitled to rescind the contract with Briant; and I am of opinion he was. The bonds which he had sold at the defendant's request were not Guatemala bonds, in the sense of the Stock Exchange. Therefore, even considering the plaintiff only as agent, when he received authority from the defendant to sell the bonds he received an implied authority to act as all brokers do upon similar occasions; that is, to rescind the contract if the article delivered turns out not to be the article sold.

Rule discharged.

1837.

May 2.

[732]

WEBB v. RHODES.

(3 Bing. N. C. 732—737; S. C. 4 Scott, 497; 3 Hodges, 138; 6 L. J. C. P. 212;
1 Jur. 41.)

Lessor and lessee, in the presence of lessor's attorney, signed an agreement that a lease should be prepared by lessor's attorney, and paid for by lessee:

The lease was prepared accordingly, but lessor, who had only a life estate, dying, the lease was never executed:

Held, that lessor's attorney was entitled to recover of lessee the charge for drawing the lease.

THE plaintiff declared for work done, in the character of an attorney and solicitor, by the plaintiff for the defendant, upon his retainer; for money paid by the plaintiff to the use of the defendant, and at his request. Plea, *non assumpsit*.

At the trial before Park, J., it appeared that a negotiation for a lease of certain land at Tottenham had been entered into between Miss Mary Ann Wright, who had a life interest in the land, and the defendant, at that time strangers to each other.

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This negotiation had been conducted by the plaintiff, Miss Wright's attorney; and Miss Wright and the defendant, having met together in the plaintiff's house, the following agreement was signed by them in the plaintiff's presence:

"The said Mary Ann Wright agrees to let, and the said James Rhodes agrees to take and rent of and from the said Mary Ann Wright, all those several pieces or parcels of meadow and pasture land, situate, &c. And the parties agree that a lease shall be granted, commencing at Michaelmas next, for the term of seven, fourteen, or twenty-one years, in case the said Mary Ann Wright shall so long live, at and under the yearly rent of 114*l.*; which lease shall contain the like covenants, conditions, and agreements, or such of them as shall be considered necessary, as the lease under which the said James Rhodes now holds the said lands; and it is also agreed that the said lease, and also a counterpart thereof, shall be prepared by Mr. Webb, solicitor, Reading, at the expense of the said James Rhodes.

"Jan. 24, 1838.

"MARY ANN WRIGHT.

"JAMES RHODES."

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The lease was drawn by the plaintiff, but the execution of it was delayed by the usual precautionary enquiries and demands; and before it could be executed, Miss Wright died.

In the course of the business, the defendant had addressed several letters to the plaintiff, on the subject of a covenant to be inserted in the lease, and in the way of enquiry as to points requiring explanation.

The plaintiff now sought to recover from the defendant, a moiety of the charge for drawing the agreement, and the entire charge for preparing an abstract and a draft of the lease.

It appeared from sundry items in the plaintiff's bill, that the defendant had a professional adviser of his *own, with whom he had consulted on the subject of the lease.

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A verdict was found for the plaintiff with leave for the defendant to move to set it aside, and enter a nonsuit instead, or reduce the damages, on the ground that, as to the lease, there was no privity between the plaintiff and defendant, but that the plaintiff should have looked to Miss Wright, who might afterwards have sued the defendant: secondly, that the lease never having been executed, the defendant could not be called on to pay for it.

A rule *nisi* was obtained accordingly on the authority of *Grissell v. Robinson* (1), *Pratt v. Vizard* (2), and *Rigley v. Daykin* (3), which establish that where by custom the lessor's attorney draws a lease to be paid for by the lessee, the attorney must look in the first instance to the lessor, who may afterwards recover from the lessee the amount paid for the lease.

Hoggins and Neville shewed cause:

It is not necessary for the plaintiff to contest the principle of the cases cited for the defendant; it may be conceded that where there is no privity between the lessor's attorney and the lessee the lessor's attorney must in the first instance look to the lessor. But here the agreement signed by the defendant in the presence of the plaintiff, is an express retainer by the defendant, and creates a privity between the parties which did not exist in the

(1) P. 574, *ante* (3 Bing. N. C. 10).

(3) 31 R. R. 554 (2 Y. & J. 83).

(2) 39 R. R. 660 (5 B. & Ad. 808).

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cases referred to. And the defendant, by corresponding with the plaintiff on the subject of the lease, shewed that such was his understanding of the matter. An attorney may without impropriety be concerned for both landlord and tenant : *Doe d. Peter v. Watkins* (1).

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Wilde, Serjt. and *Crowder*, in support of the rule :

The agreement that the lessor's attorney shall prepare the lease at the expense of the lessee, is no more than the practice of the profession would have required without any such agreement ; that agreement, therefore, cannot constitute a retainer, and the less so, as the plaintiff is no party to it. The defendant's correspondence, containing no more than the usual enquiries on occasion of such an arrangement, is no recognition of any privity between the plaintiff and defendant. *Grissell v. Robinson* is in point. At all events the plaintiff cannot recover for the lease, which owing to Miss Wright's death was never executed.

TINDAL, Ch. J. :

I can see no cause for disturbing this verdict. The question is, whether upon the evidence before the jury, they were right in finding a retainer on the part of the defendant for the plaintiff to do the work in question.

It is not whether he was retained in the capacity of attorney ; but whether he was retained to do the work for which this action is brought.

If we look at the bill, we see that the first item is for half the charge of drawing the agreement. At that time Miss Wright and the defendant were strangers : there was no joint purse out of which the plaintiff was to be paid ; and the necessary inference from the charge is, that it was understood each party should pay half. When the agreement itself was looked at, the last clause is, " and it is also agreed that the said lease, and also a counterpart thereof, shall be prepared by Mr. Webb, solicitor, Reading, at the expense of the said James Rhodes."

The parties were all present when this was signed by the defendant ; the plaintiff, therefore, must be taken to have

(1) P. 701, *ante* (3 Bing. N. C. 421).

assented, and it is the same thing as if he had been a party to the contract.

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That distinguishes the present case from those which have been cited, in which there was no agreement by the lessee to pay the lessor's attorney, and we should be anxious to avoid circuity of action, unless driven to it by the circumstances of the case: it may be necessary sometimes, but there is no reason for extending the inconvenience.

The next objection is, that the lease and counterpart were never executed; but that was no fault of the plaintiff: it was known to all the parties that the proposed lessor had only a life estate, and on the principle that *actus dei nemini facit injuriam*, the attorney ought not to remain unpaid.

PARK, J.:

I had no doubt at the trial, and have none now. I think the case should be considered the same as if the plaintiff had been party to the contract, and had put his name to it; all the parties were present together, and he must be considered as having assented to the retainer by the defendant.

BOSANQUET, J.:

I am of the same opinion. With respect to the charge for the agreement, the fair inference is, that when the two parties came to the same attorney, each was to pay half of the agreement then drawn up. The main question is, as to the lease and counterpart. Now when it is agreed that it shall be drawn by the plaintiff at the expense of the defendant, and that, in the presence of the plaintiff, he is privy to the whole, and entitled to take advantage of the agreement. He had no right to call on Miss Wright; and as it was by no fault of his that the lease was never executed, I think this rule should be discharged.

COLTMAN, J.:

I think this case stands clear of the objection that the non-execution of the lease precludes *the plaintiff from suing the defendant; for there was a retainer by the defendant engaging

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the plaintiff to do the work; at all events there was evidence from which the jury might infer such retainer, and, therefore, I think the rule should be

Discharged.

1837.
April 19.

MORRISON AND ANOTHER v. HARMER AND ANOTHER.

(3 Bing. N. C. 759—767; S. C. 4 Scott, 524; 3 Hodges, 108.)

[759]

To an action for libelling plaintiffs, in their business of sellers of medicines, by publishing that defendants had crushed the hygeist system of wholesale poisoning pursued by the scamps and rascals, the defendants pleaded and proved the conviction of two of the vendors of plaintiffs' pills for manslaughter: Held, that the plea was sufficient, and sufficiently proved, though it did not justify the words "scamps and rascals," and though one of the victims died notwithstanding he had taken fewer pills than the vendor recommended; it appearing that a larger number would only have accelerated his death. Held also, that it was not necessary for defendants to shew they had completely crushed the system.

To an action for a libel on the plaintiffs in their trade and business as manufacturers and sellers of certain good, wholesome, and lawful medicines, called Morrison's Universal Vegetable Medicines, and for causing it to be believed that the said medicines were noxious, deleterious, and unwholesome, and that the plaintiffs were in bad and insolvent circumstances, and incapable of paying their just and true debts, the defendants pleaded, as to so much of the said alleged libel as follows, that is to say, "We may safely claim the merit of having crushed the self-styled hygeist system of wholesale poisoning, since we commenced exposing the homicidal tricks of these impudent and ignorant scamps who had the audacity to pretend to cure all diseases with one kind of pills, which pills were composed of nothing more or less than gamboge and aloes. Several of the rot-gut rascals have been convicted of manslaughter, and fined and imprisoned for killing people with enormous doses of their

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*universal vegetable boluses,"—that long before and at the time of the composing and publishing the said alleged libel in the introductory part of this plea mentioned, the plaintiffs manufactured, compounded, and sold pills by them denominated "Morrison's Universal Vegetable Medicines," at the said building and place

by them called the British College of Health, and also during that time styled and denominated themselves and others, who vended and administered the said pills, by the name and denomination of hygeists; that the plaintiffs, during all the time aforesaid, and whilst they so manufactured and sold the said pills as aforesaid, were persons wholly ignorant and unskilled in the preparation and compounding of medicines, and utterly unfit to prescribe or administer medicines of any kind; that the said pills so manufactured and sold by the plaintiffs were composed of certain medicinal substances called gamboge and aloes, both of which said substances were well known to chemists and medical men, and were in common and ordinary use, and one of which, that is to say, gamboge, when unskillfully compounded, was of a highly dangerous and poisonous nature; that the plaintiffs, in order to deceive and delude ignorant and credulous persons, without any sanction or authority whatsoever, appropriated to themselves and used the name and title of hygeists, as denoting themselves to be persons skilled in promoting and preserving health, whilst, in truth and in fact, they, the plaintiffs, were wholly unacquainted with medical knowledge of any kind, and utterly ignorant and unskilled upon the subject; and in like manner to deceive and delude, denominated and called the said building or place where they so manufactured and sold the said pills, "The British College of Health;" that during all the time aforesaid the plaintiffs published and dispersed divers false, wicked, fraudulent, and impudent advertisements *and hand-bills, and therein falsely, audaciously, and wickedly stated, asserted, and pretended that the said pills, so manufactured by them as aforesaid, cured all diseases of every kind; and therein also audaciously and wickedly suggested and recommended that persons affected with diseases should take great and enormous doses and quantities thereof, and thereby, by such false and fraudulent tricks and devices, contrived and endeavoured to procure and effect the sale of the said pills, and to induce ignorant and credulous persons to purchase the same; that one of the said advertisements and hand-bills so published and dispersed by the plaintiffs, contained, amongst other things, the fraudulent, impudent, false, and delusive matters following of and

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concerning the said pills and the said plaintiffs, and the said trade and business carried on by them as aforesaid, that is to say, "Health secured by Morrison's pills, the vegetable universal medicine of the British College of Health, which has obtained the approbation and recommendation of some thousands, in curing consumption, cholera-morbus, inflammations, bilious, and all liver diseases, gout, rheumatism, lumbago, tic-doloureux, king's evil, and all cutaneous eruptions;" (Then followed particular directions for their use, viz. :)

"Nos. 1 and 2 are both aperient and purgative, and may be used indiscriminately; but experience has proved that No. 2 is the most efficacious in subduing many diseases: these diseases are fevers of all kinds, inflammations, asthma, small-pox, measles, hooping-cough, gout, cholics; in fine, all violent diseases or pain; and when the violence is over, Nos. 1 and 2 should be taken alternately till well, some days in small, and some days in large doses. It is keeping up the evacuations that effectually cures. Every bleeding is pernicious, and a step towards premature infirmities and the grave. You cannot go wrong with them by *taking them at any time day or night, or in any number, so innocent is their operation; but experience may point out the following rules, so as to render them more easy and serviceable: as an aperient, and to prevent costiveness, the dose is from two to five pills at night or morning, or any time night or day. Should you feel any uneasiness after two or three days' use, it is a sign your stomach and bowels are foul; and some large brisk doses should be taken so as to get rid of the offending humour, and persevere in that way. As a brisk purgative in either acute or chronic diseases, the dose is from eight or ten pills to twenty, or more, and, in urgent cases, should be repeated twice a day. Night or morning is the most convenient when pursuing a course; otherwise, the best rule is, to take them when one feels sickness, fever, or ague coming on: they afterwards require no attention or alteration as to diet, drink, exercise, or cold; the only thing is to continue them till well. During a course, if a patient feels any day not quite so well, let him reflect that he only wants more evacuations, and another dose will relieve him."

That on the 24th of June, 1834, one Richard Richardson,

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being then sick, was persuaded and induced by one Joseph Webb, he being one of the said self-styled persons called hygeists, to take, and did take, large quantities of the said pills as suggested and recommended in the said advertisements as aforesaid; and by reason and in consequence thereof afterwards, to wit, on &c. died; and thereupon afterwards, to wit, at the Assizes for the city of York, in the year 1834, before &c. the said Joseph Webb was in due form of law indicted and convicted of manslaughter for killing and slaying the said R. Richardson, by so administering and persuading, and inducing the said R. Richardson to take the said pills; and such proceedings were thereupon had, that at the said Assizes it was adjudged and ordered by the *said Court, that the said J. Webb should be imprisoned in the gaol of the said city for six calendar months, as by the record of the said conviction and judgment remaining in the office and custody of the clerk of the Crown of the said city of York, at Gray's Inn, in the county of Middlesex, more fully and at large appears; and which judgment still remains in full force and effect, not reversed or otherwise vacated; and the said J. Webb was thereupon imprisoned, and confined in prison, in pursuance of the said judgment.

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There was a similar averment as to the conviction of one Robert Salmon for the manslaughter of one Mackenzie by the exhibition of the same pills.

The defendants also justified as to the charge of insolvency, on which issue was taken.

At the trial before Tindal, Ch. J., it was proved on the part of the plaintiffs that the defendants had made repeated efforts to bring the plaintiffs' pills into discredit. The defendants proved that Richardson and Mackenzie were both killed by taking the pills, but that Mackenzie had taken only twenty-five per diem, when the agent who sold them, Salmon, had recommended thirty-five. The medical men, however, said that the larger quantity would have accelerated his end. The defendants failed to establish the imputation of insolvency.

The jury found a verdict for the plaintiffs, with 100*l.* damages, on the issue as to insolvency, and for the defendants on the other issue.

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HARMER.

In Easter Term

Kelly moved for judgment *non obstante veredicto* on the first plea, on the ground that it contained no justification of the expression "scamps and rascals," applied to the plaintiffs in the libel, and clearly actionable when published in writing.

[764] He also moved for a new trial on the first issue, on the ground that the plaintiffs had offered no proof of the allegation that they had crushed the homicidal system of the plaintiff, or that he had been guilty of the manslaughter of Mackenzie.

(TINDAL, Ch. J.: Can you move for a new trial on one of several issues? I remember looking into the point, and could find no authority. How would you make up the record?)

In *Bower v. Hill* (1) the cause was sent down to a new trial on one only of several counts; and in the *Cross Keys Bridge Company v. Rawlings* (2), on that issue only on which certain evidence had been rejected. Here, although there was evidence that the sale had diminished after certain convictions for manslaughter, there was no evidence that such diminution was occasioned by the defendants' attacks. And as to the alleged manslaughter, there was no evidence that the pills were taken according to the printed directions; the evidence rather shewed that Mackenzie had disobeyed the directions of the vendor Salmon.

(TINDAL, Ch. J.: He took fewer pills than Salmon directed.)

Then, the plea, ascribing the death to the pills was not sustained.

TINDAL, Ch. J.:

I am of opinion there is no ground sufficiently strong for granting a new trial in this case. It is objected first that there was no proof of the allegation that the defendants had crushed the self-styled hygeist's system of wholesale poisoning; and secondly, that, with reference to the manslaughter

(1) 41 R. R. 630 (1 Bing. N. C. 549). The circumstance is not men-

tioned in the report.

(2) 3 Bing. N. C. 71.

of Mackenzie, the allegation that he was induced to take large doses by Salmon is at variance with the evidence. I think, *however, that, upon a fair construction of the allegations, and looking at the evidence, there was sufficient to enable the jury to form an opinion, and that we ought not to disturb the verdict.

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As to the first objection, there was evidence, or an admission on the part of the plaintiffs that former publications of the defendants had been levelled at the system of the plaintiffs. And it is too much to assume that the defendants meant they had entirely destroyed the system; they meant that they had done their best to effect its destruction: the real ground of complaint was, that they had called it a system of wholesale poisoning.

As to the second objection, that there was no evidence that Mackenzie's death was occasioned by Salmon, we must look to the advertisement to see the manner in which the pills were directed to be taken, and we there see that the general direction is to be careful to take enough. The allegation in the plea is, that Mackenzie took large doses in the manner suggested by the advertisement. It was proved, however, that only twenty-five pills were taken when thirty-five were ordered: and if the non-compliance with the order had any influence in occasioning the death, there would have been some ground for the objection. But the medical witnesses said that taking more would only have hastened the patient's death, and that twenty-five would be sufficiently mischievous. That was evidence for the jury: and if they saw that non-compliance with Salmon's order did not hasten the patient's death, they were justified in the verdict they gave.

As to the motion to enter judgment *non obstante veredicto*, we will look into the plea before we decide whether we will grant a rule *nisi* or not.

Cur. adv. vult.

The judgment of the Court on the latter point was now delivered by [766]

TINDAL, Ch. J. :

We have considered the objection raised on the part of the

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plaintiffs against the form of the defendant's first plea of justification, and we are of opinion that there is no ground for the motion which has been made for judgment for the plaintiffs, *non obstante veredicto* on that plea.

The objection which has been taken is this, that the first plea, which proposes to justify the truth of so much of the libel as is set out in its commencement, contains no answer to part, and that, as it is contended, a material part of the libel so set out; inasmuch as the libel as set out in the plea applies to the plaintiffs the opprobrious and scurrilous terms of scamps and rascals, for the application of which terms the plea does not offer any excuse or justification.

Now it must be admitted, that if these terms of invective and reproach contain any ground of charge or imputation against the plaintiffs, substantially distinct in its nature or character, from that which forms the main charge, or gist, of the libel, and the truth of which has been justified by the plea, the consequence above contended for on the part of the plaintiffs would justly follow; for the plea, upon that supposition, would not contain an answer to so much of the declaration, as by the commencement of the plea it expressly undertakes to justify.

The main charge against the plaintiffs in the libel is, that they were the compounders and sellers of pills of a poisonous and deleterious nature; and the main and principal allegation in the plea of justification is, "that the pills, sold by the plaintiffs, when administered and taken in the doses and quantities suggested and recommended *by them, were of a highly dangerous, deadly, and poisonous nature, and, in the highest degree, injurious to the stomachs and bowels of persons using and taking the same." The question therefore is, whether the terms of abuse which have been above referred to, carry the matter any further than this the main charge? The words themselves, in their vulgar use, convey no other meaning than that of general reproach and invective; and we can only discover whether they have any particular meaning in this libel, by referring to the context of the libel, and to the allegations on the record. As to the word "scamp," the plaintiffs themselves have given the meaning to it; for they allege, in their declaration, that it is

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intended to be applied to them "in the way of their aforesaid trade, business, and occupation," that is, as vendors of the pills, the making and selling of which by the plaintiffs is the main imputation against them. And the word "rascals" is associated with an epithet or adjunct which appears to confine its general abusive quality to a description and designation of the persons who have been occupied in administering the pills spoken of in the libel, of whom two have been convicted of manslaughter. We cannot therefore understand these words, however offensive, as containing any charge different and distinct from that of which the truth has been justified in the first plea; and we are not aware of any authority, by which it is determined, that the justification of the truth of the substantial imputation contained in a libel, is not sufficient, unless it extends also to every epithet or term of general abuse which may be found in the description or statement of such imputation.

We think therefore, the rule which has been applied for to permit the plaintiffs to enter up judgment, *non obstante veredicto*, must be refused.

Rule refused.

POLE, CHAIRMAN OF THE SUN LIFE ASSURANCE SOCIETY, *v.*
ROGERS, CHAIRMAN OF THE UNION LIFE OFFICE.

(3 Bing. N. C. 780—781; S. C. 4 Scott, 479; 3 Hodges, 83; 6 L. J. (N. S.)
C. P. 216; 5 Dowl. P. C. 632.)

1837.
May 8.

[780]

Mode of proceeding under commission to examine witnesses.

At the instance of the defendant an order having been procured from Lord DENMAN, Ch. J. that a commission should issue, entitled in this cause, an action on a life policy, for the examination of witnesses at Paris and Boulogne,

A rule *nisi* was obtained on the part of the plaintiff for amending this order, by adding thereto a liberty to the plaintiff, his attorney, or agent, to cross-examine the witnesses *vivâ voce*, such examination to be reduced into writing and returned with the commission to one of the secondaries of this Court.

R. V. Richards, who shewed cause, objected that great

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inconvenience and expense would be occasioned by any mode of examination, other than the usual course of written interrogatory.

Wilde, Serjt. in support of the rule :

Under s. 4 of 1 Will. IV. c. 22 (1), the manner of examination, as well as the time and place, are in the discretion of the Court, as they were under the East India Act from which the provisions of the recent statute have been adopted. An application similar to the present was complied with in *Ducket v. Williams* (2).

TINDAL, Ch. J. :

[*781] The application is reasonable in the present instance, for at Paris and Boulogne there can *be no difficulty in obtaining assistance for the proposed examination.

Rule absolute, to add to Lord Denman's order that plaintiff be at liberty to cross-examine viva voce, and to join in commission ; defendant to be at liberty to add additional questions to his interrogatories : cross-examinations and answers to be reduced into writing and returned with the commission.

1837.
May 23.

MOON v. THE GUARDIANS OF THE POOR OF THE
WITNEY UNION.

[814]

(3 Bing. N. C. 814—820 ; S. C. 5 Scott, 1 ; 3 Hodges, 206 ; 6 L. J. (N. S.) C. P. 305 ; 1 Jur. 41.)

Defendants employed K. to draw a specification of a building proposed to be erected. K. employed plaintiff to make out the quantities ; which work was to be paid for by the successful competitor for the building contract ; defendants having refused to allow the building to proceed : Held, that they were liable to the plaintiff for making out the quantities.

DEBT for work and labour, money paid, and on an account stated.

Plea, *nil debet*.

The plaintiff sought to recover 65*l.* for making out the

(1) Repealed 46 & 47 Vict. c. 49, r. 5.

s. 3. See now R. S. C. Ord. XXXVII., (2) 1 Tyr. 502.

quantities or calculations of the expense of erecting a workhouse; and the question was, whether under the circumstances the defendants were liable for this charge.

At the trial, before Tindal, Ch. J., the plaintiff called *Mr. Kempthorne, an architect, who proved that in March, 1835, he, Kempthorne, had been employed by the defendants, guardians of the poor of the Witney Union, to draw specifications of the plan of a new workhouse, proposed to be erected by the defendants at Witney:

That, on the 30th of April, 1835, he wrote to Leake, the clerk of the guardians, and enclosed the form of an advertisement, as follows: "To builders. The board of guardians of the Witney Union, Oxon., are desirous of receiving tenders for the erection of the new workhouse at Witney. The plans and specification may be seen at the office of Mr. Kempthorne, or Mr. Leake, clerk to the board, Witney, after the 18th of May. Sealed tenders must be sent to Mr. Leake, Witney, before the 4th of June."

In a few days, Kempthorne forwarded the specification to Leake, and desired him to shew the builders the following instructions: "14th May, 1835. The builders desirous of contracting for the erection of the Witney workhouse, are informed that the quantities of the works are now being taken out for their use, and will be ready by the 28th instant. Builders requiring a copy of the same, are requested to leave their names, with the sum of 2*l.* 2*s.* at Mr. Kempthorne's office, or at Mr. Leake's, clerk to the Union, Witney, before the 26th instant. The successful competitor will have to defray the expense of taking out the quantities, the charge for which will be stated at the foot of the bill of quantities when delivered. No tracings or copies of the drawings will be allowed. SAMPSON KEMPTHORNE."

The plaintiff made out the quantities at the request of Kempthorne, but a dispute having arisen between Kempthorne and the defendants, they refused to go on with the work; and Kempthorne, on the 15th of July, 1835, sent to them his "account of professional charges *for the working drawings and specification of the proposed workhouse, together with the surveyor's

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bill for making out the quantities of the same, for the use of the builders."

Kempthorne's charge for the specification and journies was 113*l.* 8*s.* 8*d.* Moon's charge for the quantities, (appended to Kempthorne's bill), was 65*l.*

After some discussion, the defendants offered, and Kempthorne accepted 80*l.*, in discharge of his claim; and he gave a receipt for that sum as paid "for professional assistance, as per account delivered."

The defendants never heard of Moon till Kempthorne's bill was delivered, but they made no specific objection to the charge for his services.

The plaintiff called Kempthorne and others, who proved a usage for architects to have their quantities made out by surveyors, and for the successful contractor to add the amount to his contract. They said also that this usage was beneficial to all parties. The jury found that such a usage existed, and gave their verdict for the plaintiff.

Talfourd, Serjt., pursuant to leave reserved at the trial, obtained a rule *nisi* to set aside this verdict, and enter a nonsuit instead, or to have a new trial, on the ground that no privity had been established between the plaintiff and defendants; that the usage was not binding on the defendants; and that it had not been sufficiently proved.

Wilde, Serjt. and *Wilmore* shewed cause :

The calculation of quantities by a surveyor is essential to the accuracy of the specification: when, therefore, the defendants authorised Kempthorne to prepare the specification, they authorised him as their agent to procure the quantities also: through the agency of Kempthorne *there was a privity between the plaintiff and the defendants; and the arrangement, that the successful contractor should pay for the quantities, must be taken as subject to an implied condition, that the defendants should pay the amount, if, through their default no contract was entered into. The defendants having, by their agent, actually employed Moon, the proof of the usage becomes immaterial; but *Rigley v.*

Daykin (1), and *Grissell v. Robinson* (2), are authorities in favour of such a custom.

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Talfourd and *Chilton* in support of the rule :

The defendants knew nothing of Moon, and Kempthorne had no power to create a liability which never was in the contemplation of the defendants. He was only employed to draw a plan. In the authorities referred to the usage was clearly proved. Here, the evidence was not all consistent. But if the usage existed, and the plaintiff had a claim against the successful contractor, he cannot, at the same time, have a claim against the defendants.

TINDAL, Ch. J. :

The question before us comes at last to the point, whether when this plaintiff was employed for the defendants there was a contract under which he is entitled to sue them in an action for work and labour. That the plaintiff himself made any such contract is not pretended : the parties never saw each other : the question is, whether Kempthorne, as agent for the defendants, had any authority to bind them in a contract with the plaintiff.

That was the point left to the jury ; and the jury found that there was a usage in the trade for architects or builders to have their quantities made out by surveyors. *Now, according to the maxim of the civil law, *in contractis tacitè insunt quæ sunt moris et consuetudinis* ; and that usage having been found by the jury, there were many things which go to support their verdict. It appeared that the custom is beneficial to the parties concerned ; that if builders are not assisted by surveyors, they send in tenders which lead to loss and inconvenience from a mistake in the quantities. Then, the defendants themselves had an intimation that such was the practice ; for Kempthorne wrote to Leake, the defendants' attorney, and Leake gave out, that the successful competitor should defray the expense of taking out the quantities. If this was to be so, what was to be the result, if by the act of the defendants there was no successful competitor, because there was no competitor at all ? In such a case the defendants must

[*818]

(1) 31 R. R. 554 (2 Younge & Jer. 83). (2) P. 574, ante (3 Bing. N. C. 10).

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be liable for the amount of a charge which they have authorised their builder to incur. Then, when upon their refusal to proceed, Kempthorne sent in his account, comprehending the charge for the surveyor, they had express notice of the existence of the charge; they came to an agreement with Kempthorne in respect of his own demand, to pay a sum which could not comprehend the plaintiff's charge: and their conduct upon that occasion was a recognition of the claim which they did not settle or object to.

It is contended on behalf of the defendants, that a contract cannot shift so as to leave two different parties liable to the plaintiff at the same time: that may be so in some cases; but the difficulty is got over here by considering this a conditional contract: a contract under which it was arranged that the expenses of making out the quantities should be paid by the successful competitor, if any; but if by the act of the defendants there should be no competitor, then, that the work which was done by their authority, should be paid for by them.

[819] PARK, J. :

I think it perfectly clear that there is sufficient in the circumstances of this case to raise an implied contract on the part of the defendants to pay for the services of the plaintiff. Kempthorne had authority to proceed in the usual way; and, according to the practice in building contracts, the quantities are made out by a surveyor, and paid for by the successful competitor for the work proposed; is it then to be said, that when by the act of the defendants there can be no successful competitor, the plaintiff is to receive nothing for his services? The defendants were aware of the plaintiff's demand from the account sent in by Kempthorne; they never objected that they were not liable; and they could not have believed that they had satisfied both claims for the sum of 80*l*. This rule, therefore, must be discharged.

BOSANQUET, J. :

There is no ground for disturbing this verdict. The jury must be taken to have found that what has been done was done consistently with the usage of the trade. It has been contended that architects are employed only to draw plans, and not to make

out quantities: but the defendants knew that the quantities were to be made out by somebody; and that if the work proceeded the surveyor was to be paid by the successful competitor; and the jury have said that Kempthorne, in employing a surveyor acted according to the usage of the trade. If so, the plaintiff was employed under the authority of the defendants' agent; and if they exclude all competitors, must look to them, as principals, for the payment of his demand.

COLTMAN, J. :

The plaintiff's case is, that if there should be a successful competitor for the building he was to pay for making out the quantities; but if there should be no such competitor, the defendants. The *defendants on the other hand say, that if there should be no successful competitor, no one was to pay the plaintiff, and that his employment was a speculation which he chose to enter into on those terms.

[*820]

It is not probable the plaintiff should have entered into such a contract as the defendants set up, and it is for them to establish it by evidence: if it be not established, the plaintiff must be paid by some one: and the question then is, whether Kempthorne had impliedly authority to employ the plaintiff on behalf of the defendants: the jury found, in effect, that he had, and I think there is sufficient to warrant their finding. From the nature of an architect's employment, he is not expected to make out quantities, or come under advances; but merely to certify to his employer that the bills sent in are correct. It has, therefore, been the practice for some years to employ surveyors to make out the quantities: the defendants' architect intimated to their attorney that a surveyor would be employed; and what passed when the architect's account was sent in amounts to a recognition that he had acted within the scope of his authority. If the defendants did not mean to pay the plaintiff, they should have given Kempthorne notice to that effect: the money they paid, must, from its amount, be considered to have been paid in discharge of Kempthorne's demand only; and therefore this rule must be

Discharged.

1837.
May 31.
 [828]

CUNLIFFE AND OTHERS *v.* WHITEHEAD.

(3 Bing. N. C. 828—832; S. C. 5 Scott, 31; 3 Hodges, 182; 6 L. J. (N. S.)
 C. P. 255; 6 Dowl. P. C. 63.)

Declaration that F. drew his bill on the defendant, who accepted the same; that F. then indorsed the bill to S., who delivered it to the plaintiff: Held, ill.

THE declaration stated that one William Fraser, on the 18th of July, 1833, at London, made his bill of exchange, in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said W. Fraser's order 1,500*l.* value received, five months after date thereof, which period had elapsed before the action; that the defendant accepted the said bill; that W. Fraser then indorsed the same to Messrs. Salomonson, Fraser, & Co.; and that the said Messrs. Salomonson, Fraser, & Co., delivered the same to the plaintiffs; of all which the defendant had due notice, and promised the plaintiffs to pay the amount of the bill according to the tenor and effect thereof, and of his acceptance thereof.

General demurrer and joinder.

[After argument:]

[830] TINDAL, Ch. J.:

Whatever construction may be put upon the new rules (1), it is, at all events, perfectly clear that they cannot be construed, nor were they intended to effect any alteration in the law-merchant of this country, and make bills of exchange, which before the promulgation of these rules passed by indorsement, pass by delivery only. The question now is, whether the bill, as set forth on this record, gives the party by whom the action is brought a title to sue. It appears that Fraser drew the bill, which was accepted by the defendant, payable to the order of Fraser, who indorsed it to Salomonson, Fraser, & Co. The bill being drawn payable to order, required an indorsement before a third party could recover the amount, or enforce payment against the acceptor. Bare delivery without indorsement would

(1) See now R. S. C. Ord. III. r. 6, Act, 1882 (45 & 46 Vict. c. 61), and corresponding forms in Appendix. s. 31 (4).—R. C. And see Bills of Exchange

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not give such right. There was a time when the omission of the words, "or order," in the indorsement by the drawer, was thought to render the indorsement restrictive. But in *Edie v. The East India Company* (1), a foreign bill drawn upon the East India Company, payable to Campbell or order, was indorsed to Ogilby, by Campbell, who did not add the words, "or order : " Ogilby indorsed it to the plaintiffs: it was insisted that under the indorsement to Ogilby, he had no authority to indorse it over, and upon that ground the jury found for the defendants. But upon a rule to shew cause why there should not be a new trial, the Court were clear that as the bill was originally in its nature negotiable, it continued so in the hands of Ogilby, and that his indorsement was sufficient. But without his indorsement the bill would not have passed; and there is nothing in the new rules, as far as I can discover, to interfere with these indorsements upon the transfer of the bill *toties quoties*. It is said, that as the bill has been indorsed by the drawer to Salomonson and Fraser, the legal inference to be drawn from the new rules, is, that such indorsement by the person to whose order the bill was made payable, was sufficient to give a third party title to sue, in the manner attempted here, without any other indorsement. Such, however, is not the legal inference: and as to the argument that the plaintiffs have been misled by following the new rules, and that the difficulty has been occasioned by adhering to them, it appears to me that the difficulty has been occasioned by not adhering to them, inasmuch as all the precedents there given, set forth the successive indorsements. Perhaps there was something in the state of facts here, which would not allow of the allegation of such indorsements. But it appears to me, that the indorsement by Fraser the drawer, to Salomonson and Fraser, without an indorsement from the latter to the plaintiffs, does not give the plaintiffs a right to sue in this action: they cannot derive title from delivery alone.

[*831]

PARK, J. :

I never before saw a declaration in which it was attempted to

(1) 1 W. BL 295; *S. C. Burr.* 1216; *Bayley on Bills*, 4th ed. p. 105.

CUNLIFFE v. WHITEHEAD. give the plaintiff an interest in a bill of exchange by delivery alone, without an indorsement.

In the precedents given in the new rules, in all the instances which bear an analogy to the present, every transfer of the bill is stated to be by indorsement. I do not understand why the Courts should in this instance vary the rule upon which they act in all cases, because there may be something behind, which prevents the party from declaring in the usual manner. Our judgment must be for the defendant.

VAUGHAN, J. :

[*832] I am of the same opinion. The new rules have not altered the law upon the point which is the subject of discussion. The plaintiffs have, in my *opinion, failed in deducing their title; they have failed in shewing title through an indorsement from Salomonson & Co., and consequently are not enabled to sue.

COLTMAN, J. :

The question here is, as to the meaning of the allegation that the bill was indorsed by the drawer to Salomonson and Fraser. It may mean that he simply put his name on the back of the bill, or it may mean that he wrote "pay to the order of Salomonson and Fraser." But the plaintiffs have not shewn such title as will enable them to recover on this record, and our judgment must be

For the defendant.

1837.
June 6.
[835]

DOYLEY v. ROBERTS.

(3 Bing. N. C. 835—841; S. C. 5 Scott, 40; 3 Hodges, 154; 6 L. J. (N. S.) C. P. 279; 1 Jur. 242.)

"He has defrauded his creditors, and has been horsewhipped off the course at Doncaster," spoken of an attorney: Held, not actionable, unless spoken of him in his profession.

SLANDER.

The plaintiff declared that he was an attorney, and that the defendant had falsely and maliciously spoken and published of the plaintiff, and of and concerning him in the way of his

business or profession, that “ he had defrauded his creditors, and had been horsewhipped off the course at Doncaster.” Special damage, that one H. Gyde, had, in consequence, declined to employ the plaintiff.

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At the trial before Parke, B., last Worcester Assizes, the words were proved to have been spoken by the defendant, of the plaintiff, who was more engaged on the turf than in law, and had had creditors in sporting *transactions; and the jury found, in answer to questions put to them by the learned Baron,

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That the words were spoken of and concerning the plaintiff :

That they were not spoken of him in his business of an attorney :

That they had a tendency to injure him morally and professionally. But,

That H. Gyde did not in consequence of them decline to employ the plaintiff.

A verdict was given for the plaintiff, with 50*l.* damages ; but the defendant had leave to move to enter a nonsuit instead, if the Court should be of opinion that the words were not actionable unless spoken of the plaintiff in the way of his business as an attorney.

Godson having obtained a rule *nisi*, accordingly,

Talfourd, Serjt. and *Busby* shewed cause :

There was evidence to go to the jury as to the intention of the defendant in speaking the words : if, therefore, they are not actionable, the defendant should have demurred, or have moved in arrest of judgment, and not for a nonsuit. The jury having found that the words spoken had a tendency to injure the plaintiff morally and professionally, the verdict ought to stand ; for if they have a tendency to injure him in his profession, it is not necessary they should be spoken of him in his profession. In *Onslow v. Horne* (1) DE GREY, Ch. J. laid it down, “ That words are actionable when spoken of one in an office of profit, which may probably occasion the loss of his office ; or when spoken of persons touching their respective professions, trades, and business, and do or may probably tend to their *damage ; ” but

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that rule was qualified in *Lumby v. Allday* (1) by BAYLEY, B., who said, "Every authority which I have been able to find, either shews the want of some general requisite, as honesty, capacity, fidelity, &c., or connects the imputation with the plaintiff's office, trade, or business." Here, the words imputed a want of honesty, a general requisite. In *Stanton v. Smith* (2) it was held actionable to say of a tradesman, "He is a sorry, pitiful fellow, and a rogue; he compounded his debts at 5s. in the pound;" though there was no colloquium of his trade; and the Court said, "We were all of opinion that, such words spoken of a tradesman must greatly lessen the credit of a tradesman, and be very prejudicial to him, and, therefore, that they were actionable." In that case the defendant did not use the word bankrupt, but the Court drew the inference that the words complained of were equivalent. So here, the charge that the plaintiff defrauded his creditors, is equivalent to saying he could not be trusted. In *Whittington v. Gladwin* (3), it was held that words of an innkeeper imputing insolvency were actionable, although at the time when they were spoken, an innkeeper was not subject to the bankrupt laws: and ABBOTT, Ch. J. said, "Such an imputation is calculated to prevent him from having that credit which is at least useful, if not necessary, in his business; the words, therefore, are likely to be injurious to him. In *Southam v. Allen* (4), the following words spoken of an innkeeper were held, after verdict and much debate, to be actionable: 'Deal not with the plaintiff, for he is broke; and there is neither entertainment for man or horse.' According to all the principles upon which such an action for slander is maintainable, and upon *that authority, I am of opinion that this action is well brought."

[*838]

In 1 Vin. Abr., Action for Words, S. a. 2, it is laid down as actionable to say of an attorney, "He is the falsest knave in England, and he will cut your throat:" Of a tradesman, "He is a broken runaway, and dares not shew his face;" U. a. 6: Of a goldsmith, "Thou art a cozening knave, and soldest me a chain of copper for gold."

(1) 35 R. R. 715 (1 Cr. & J. 301,
 1 Tyr. 217).

(2) 2 Ld. Ray. 1480.

(3) 29 R. R. 212 (5 B. & C. 180).

(4) Sir T. Ray. 231.

Godson and W. Alexander in support of the rule :

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According to the latest authorities it is not sufficient that the plaintiff was an attorney, or that the words were spoken of him, being an attorney, unless they were also spoken of him in his character of attorney; for though the plaintiff may be an attorney, it does not follow that he is practising as such, or liable to sustain any inconvenience. In *Ayre v. Craven* (1), the declaration for slander, alleged that defendant used words imputing adultery to the plaintiff, a physician; and the words were laid to have been spoken "of him in his profession:" no special damage was laid: and after verdict for the plaintiff, judgment was arrested, the Court holding, that such words, merely laid to be spoken of a physician, were not actionable without special damage; and that if they were so spoken as to convey an imputation upon his conduct in his profession, the declaration ought to have shewn how the speaker connected the imputation with the professional conduct. And Lord DENMAN, Ch. J. said, "Some of the cases have proceeded to a length which can hardly fail to excite surprise; a clergyman having failed to obtain redress for the imputation of adultery (2), and a school-mistress having been declared incompetent to maintain an action for a charge of prostitution (3). *Such words were undeniably calculated to injure the success of the plaintiffs in their several professions; but not being applicable to their conduct therein, no action lay." In *Richardson v. Allen* (4), the words, "He has defrauded a mealman of a roan horse," were held not actionable, without special damage.

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In *Whittington v. Gladwin*, and *Stanton v. Smith*, the plaintiffs were tradesmen, and the words were spoken of them in their trade. Here the words were not spoken of the plaintiff with reference to his clients, and the fallacy on his part consists in treating the word creditors as equivalent to clients. If the words were not actionable, the Judge who presided at the trial should have directed a nonsuit: *Tomlinson v. Brittlebanke* (5). But as

(1) 41 B. R. 359 (2 Ad. & El. 2). v. *Brook*, 1 Ventr. 21.

(2) See *Purrat v. Carpenter*, Noy, 64; S. C. Cro. Eliz. 502.

(4) 2 Chitty, 657.

(5) 38 B. R. 335 (4 B. & Ad. 630).

(3) Per TWISDEN, J., in *Wharton*

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ROBERTS. to the form of the rule, the Court will mould it to an arrest of judgment, if necessary.

TINDAL, Ch. J. :

We must consider this case as if the rule had been drawn up for a nonsuit, or for an arrest of judgment. I see no ground for entering a nonsuit, because there was evidence to go to the jury whether or not the words were spoken of the plaintiff in his profession ; and that question the Judge was obliged to leave to the jury before the point could arise which has now been discussed. The defendant, therefore, ought now to be permitted to move an arrest of judgment, and I think that judgment should be arrested.

[*840] The case will stand thus : The plaintiff is an attorney, and carries on business as such, but appears to have had creditors in certain sporting transactions ; the defendant says of him generally, that he has defrauded his creditors, and the jury find that these words were not spoken of him in his business of attorney. Now in Comyns's Digest, Action on the Case for Defamation, it is *laid down, D. 27, that " words, not actionable in themselves, are not actionable when spoken of one in an office. profession, or trade, unless they touch him in his office : " and these words, though spoken of an attorney, do not touch him in his profession, any more than they would touch a person in any other trade or profession. It is found, indeed, that the words have a tendency to injure him morally and professionally ; and that is true ; but it applies equally to all other professions, for a person cannot say any thing disparagingly of another, that has not that tendency : upon that subject the authority of *Ayre v. Craven* is conclusive ; and a rule for arresting judgment in this case must therefore be made absolute.

PARK, J. :

I am of the same opinion, and always considered that the principle as laid down in Comyns's Digest is correct. Here the jury have negatived the allegation, that the words were spoken of the plaintiff in his profession. That being the case, they are words of great abuse, but not so severe as many of the expressions which are pointed out in *Ayre v. Craven* as having been

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held not actionable. Lord DENMAN, Ch. J. says, "After full examination of the authorities, we think that, in actions of this nature, the declaration ought not merely to state that such scandalous conduct was imputed to the plaintiff in his profession, but also to set forth in what manner it was connected by the speaker with that profession."

I cannot distinguish that case from the present.

VAUGHAN, J. :

When the jury found that these words were not spoken of the plaintiff in his character of attorney, they took the sting out of the imputation. The rule for an arrest of judgment must be made absolute.

COLTMAN, J. :

Stanton v. Smith is the only case which has a tendency to support the argument for the plaintiff. *But it is a solitary case, and at variance with decisions before and since. To render words of this kind actionable, they must have relation to the trade or profession of the plaintiff.

['841]

Rule absolute.

LUCY v. WALROND, ADMINISTRATOR OF WALROND (1).

1887.
June 6.

['841]

(3 Bing. N. C. 841—848; S. C. 5 Scott, 46; 3 Hodges, 215; 6 L. J. (N. S.) C. P. 290.)

Defendant, before taking out letters of administration, sanctioned an expensive funeral which a relation had ordered for the deceased: Held, that after taking out administration, defendant was liable in the capacity of administrator for this expense.

ASSUMPSIT for work and labour performed by the plaintiff, as undertaker, about the funeral of Caroline Walrond, deceased, at the request of the defendant, as administrator, and for hearses,

(1) It is clear from *Brice v. Wilson* (1834) 40 B. R. 461 (3 N. & M. 512) that an executor who has sanctioned an extravagant funeral is liable personally. In the above case the contention that the defendant should

have been sued personally and not as administrator appears to have been excluded by admission of the character of executor by the letter from London and by the pleadings. —R. C.

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coaches, horses, and other necessary things used and applied in the furnishing and conducting the said funeral; for money paid for the use of the defendant as administrator, as aforesaid; and for money due from him in that capacity upon an account stated.

Plea, that the defendant brought 53*l.* into Court, to be paid to the plaintiff, and that he ought not further to maintain his action.

At the trial before Parke, B., at the last Gloucester Assizes, it appeared that Mrs. Caroline Walrond, the defendant's mother, a lady of fortune, died on the 31st of October, 1833, at Lasborough, in Gloucestershire. The defendant being at that time at Paris, Sir Bethell Codrington, the brother of the deceased, was sent for, and gave orders that the deceased should be buried at Dodington, the family seat, eleven miles from Lasborough, and that the funeral should be a respectable one. The funeral was performed by the plaintiff, at an expense of 76*l.* 7*s.* 1*d.*, including 14*l.* 1*s.* 6*d.* for a hearse and four horses, mourning coach and four horses, and two *post horses; and 5*l.* 5*s.* 0*d.* for fees to the clergyman, the payment of which the plaintiff failed to prove at the trial.

[*842]

The defendant, in a letter from Paris, addressed to Lady Codrington, and dated November 10th, 1833, expressed his fear that even before he had heard of his mother's death the last melancholy offices must have been paid to her remains; and about the 24th of November, in answer to a letter addressed to him at his residence in London, by Lady Codrington, the defendant wrote as follows:

"We arrived in London on Tuesday evening, and I found your kind letter, and one from my uncle, inclosing a copy of my poor mother's will. I delayed writing until I could with some certainty say when I could leave London. I now hope to get away Monday or Tuesday next, and I will avail myself of your and my uncle's kind invitation to come to Dodington. The next day I will ask you or Sir Bethell to be so good as to accompany me to Lasborough, to break the seals, and commence our sad duty. I am much obliged to you and to him for all you have done, which was certainly the best, and all that could be done. Would you or Sir Bethell have the kindness to do, what I am told must be done sooner or later, send some one to the house to take a list of all property whatsoever, in and out of

doors, which is not sealed up, with a view to its future valuation. This will shorten my melancholy task."

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The following codicil was attached to the will of the deceased :
"I wish to be buried in the nearest churchyard to the place in which I may die, with as little expense as possible ; neither hearse nor carriage ; but to be carried by twelve respectable labourers, who shall receive not less than a guinea each. I wish no friend or relative to mourn for me, that is, to wear mourning."

The defendant refusing to pay for the removal of the *deceased to Dodington, resisted the plaintiff's claim for more than 53*l.*, the estimated expense of a plain funeral.

[*843]

The defendant took out letters of administration *cum testamento annexo*, in November, 1834, and the effects were sworn to be under the value of 4,000*l.*

The plaintiff relied on *Rogers v. Price* (1), where it was held that an executor who had assets sufficient for that purpose, was liable, upon an implied promise, to pay for a funeral suitable to the degree of his testator, furnished by the directions of a third person.

It was contended also, that the payment of money into Court, upon a declaration charging the defendant in the character of administrator was an admission of his liability, in that character, on the contract made for him by Sir Bethell Codrington ; and that the letter from London was a ratification of all that had been done.

For the defendant, it was argued that the payment into Court under a plea of payment, admitted no liability on any contract for an expense of more than 53*l.* ; and that without producing the letter from Lady Codrington, to which the defendant's letter from London was an answer, that letter could not be esteemed a ratification of the order for the funeral, but seemed rather to relate to the disposition of the property.

PARKE, B. was of opinion that, provided the defendant had assets, of which there was evidence to go to a jury, he was liable for such a funeral as the testatrix had ordered ; and for such a funeral as Sir Bethell Codrington had ordered, if the jury should be of opinion that the defendant's letter from London was a ratification of that order.

(1) 32 R. R. 729 (3 Y. & J. 28).

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[844]

The jury found a verdict for the plaintiff, Damages 16*l.* 8*s.* 0*d.*

Maule moved for a new trial, on the ground that under the circumstances of the case, the defendant was not liable for more than the expense of an ordinary funeral. In *Rogers v. Price* (1) the executor was held liable to defray reasonable funeral expenses. But here an order was given by the brother of the deceased for an expensive funeral, in opposition to the directions contained in the will of the deceased. At that time the defendant was absent; there was therefore no privity between him and the plaintiff, unless it arose upon the subsequent ratification; and the letter of the 24th of November would not amount to a ratification, unless the letter to which it was an answer expressly stated the contract entered into by Sir Bethell Codrington: that letter, however, was never produced. But if, upon production, it had disclosed the terms of the contract with the plaintiff, the defendant at the time of the supposed ratification was not administrator, and therefore could not ratify, or be liable to an action in the character of administrator: if liable at all, it must have been on his own responsibility; and then, this action against him in the character of administrator was misconceived.

The payment into Court by plea of payment to a general *indebitatus assumpsit* did not admit more than payment under a rule of Court in the old practice, and such payment admitted merely that the defendant was liable to the extent of the sum paid in, and no further: *Mellish v. Allnutt* (2), *Blackburn v. Scholes* (3), *Seaton v. Benedict* (4). A rule *nisi* having been granted,

[*845]

Talfourd, Serjt. and *Lumley*, who shewed cause, relied upon *Rogers v. Price*, and upon the finding of the jury, *as to the effect of the defendant's letter of November 24th. It would no doubt have been more satisfactory if the letter had been produced to which that was an answer; but the answer itself was evidence to go to the jury.

Maule and *R. V. Richards* were heard in support of the rule.

(1) 32 B. R. 729 (3 Y. & J. 28).

(3) 11 R. R. 723 (2 Camp. 341).

(4) 5 Bing. 28, 32.

(2) 14 R. R. 599 (2 M. & S. 106).

TINDAL, Ch. J. :

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If this case was properly left to the jury, there is no reason for disturbing the verdict, the sum recovered being under 20*l*. And it appears to us that there *was* evidence to go to the jury.

This is an action for work and labour performed in conducting a funeral, and for hearses, coaches, and horses supplied on the occasion, by the plaintiff, at the request of the defendant, administrator of the deceased. The defendant puts in a plea that he has brought 53*l*. into Court, to be paid to the plaintiff, and that he ought not further to maintain this action. I am unable to perceive any difference between the effect of this plea, and of payment into Court under a rule, according to the old practice. The payment under the rule was directed against the further maintenance of the action, and when the present plea concludes against the further maintenance of the action, it leaves the question as to further damages the same as under the old plea of *non assumpsit*, and payment into Court under a rule. The defendant therefore is not bound by the admission, beyond the 53*l*. paid into Court, and it is open to him to make any objections to the recovery of further damages. But this action is brought against him in his character of administrator, which is admitted by the course of the pleadings, and the question is, whether the defendant in that character has ratified the order given for burying the deceased at a distance *from her residence. I think the letter of the 24th of November, 1833, amounts to such a ratification.

[*846]

It has been objected, first, that at the time he wrote that letter, it does not appear the defendant knew in what way the funeral had been performed ; and secondly, that he could not then ratify the order for the funeral in the character of administrator, because he did not take out administration till long afterwards.

Now, the letter was written on a Saturday, the defendant having arrived in London on the preceding Tuesday, at which time the funeral had been performed ; and I cannot help collecting that the writer must have been told of what had taken place as to the funeral : he says, “ I found your kind letter, and one from my uncle, inclosing a copy of my poor mother’s will. I am much obliged to you and to him for all you have done,

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which was certainly the best, and all that could be done. Would you or Sir Bethell have the kindness to do, what I am told must be done sooner or later, send some one to the house to take a list of all property whatsoever, in and out of doors, which is not sealed up, with a view to its future valuation."

The circumstance and tone of the letter is that of a man who expected to be personal representative; why else should he speak of breaking seals, and making an inventory? Accordingly, a year after, he does take out administration; and it is reasonable that any effect of the letter should refer to his powers in the capacity of administrator.

But it is said that as he was not administrator at the time, the letter cannot have that effect. It is clear, however, that a creditor who assents before administration, to a given disposition of the intestate's effects, is bound by it after administration. Now if a creditor is bound after administration, by an assent given before administration to a particular disposition of the intestate's *effects, why should not the administrator after administration be equally bound by what he undertook before? After paying money into Court in the capacity of administrator, he must be supposed to have sanctioned as administrator the funeral of the intestate; the question is confined to the amount that ought to be paid; and it becomes unnecessary to say any thing as to the case of *Rogers v. Price* (1).

[*847]

PARK, J.:

It is unnecessary to discuss the case of *Rogers v. Price*, for there can be no doubt, on reading the defendant's letter of the 24th of November, that he had been apprised of all that had been done, and that he intended to take out letters of administration. He had no right to order a valuation of the effects unless he intended to take out administration; and administration when granted has relation to the death of the intestate, so as to give validity to acts done before administration (2). The

(1) 32 R. R. 729 (3 Y. & J. 28).

(2) This appears to be too broadly stated. Compare *Doe d. Hornby v. Glenn* (1834) 40 R. R. 251 (1 Ad. & El. 49). And see the more cautious

statement of the effects of relation back as regards an administrator in the judgment of PARKE, B. in *Foster v. Bates* (1843) 12 M. & W. 226.—R. C.

question therefore was properly left to the jury, and the learned Judge not being dissatisfied with the verdict, this rule must be discharged.

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VAUGHAN, J. :

I am of the same opinion, and should regret if we were compelled to declare that the plaintiff is not entitled to recover. I do not subscribe to the distinction attempted to be made between payment into Court under a plea, and payment under a rule, and I think that the defendant is not, by this payment, precluded from raising any objection to the further maintenance of the action : but nothing turns on *Rogers v. Price*, which only decides that the personal representative is liable for the expense of a suitable funeral. The question here is, whether it was properly left to the jury to determine that the defendant had ratified the order given for his mother's funeral ; and upon reading the letter of the 24th of November, no one can entertain any doubt. From his directions as to breaking seals and taking a valuation, it is plain he was contemplating, if not assuming, the character of executor or administrator.

[*848]

COLTMAN, J. :

It has been urged that the action against the defendant in the capacity of administrator is misconceived, and that he should have been sued, if at all, in his own character. If so, he should have pleaded *non assumpsit*. But the plea of payment into Court admits that the plaintiff has a right to sue to some extent on all the counts in the declaration, and admits that the defendant is properly sued in the character of administrator. In *Meager v. Smith* (1) it is said, " With regard to the effect of paying of money into Court, there is no doubt, but that if such a payment is made on a count alleging a special contract, it operates as an admission of that contract." It comes then to the question, whether there is on the face of the defendant's letter a ratification of the order for conducting the funeral in the particular manner which occasioned the expense. That

(1) 4 B. & Ad. at p. 680 [overruled (in effect) *Kingham v. Robins* (1839) 5 M. & W. 94].

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letter refers to another which was not produced, but there was sufficient to enable the jury to infer that the defendant knew and approved of what had been done. I think, therefore, the rule must be

Discharged.

1837.

June 6.

[849]

WILLIAMS v. GESSE (1).

(3 Bing. N. C. 849—850; S. C. 5 Scott, 56; 3 Hodges, 131; S. C. at Nisi Prius, 7 Car. & P. 777.)

An innkeeper is not liable in trover for the loss of articles deposited in his house for the purpose of being forwarded by a carrier.

TROVER for a coat and pantaloons.

Plea, not guilty.

The defendant kept a public-house at Oxford, frequented by farmers.

The plaintiff's clothes, packed up in a box, were deposited in the defendant's kitchen, behind the settle, by a person who said the box was to stay till called for.

The box was never seen again by the plaintiff, but when he inquired for it, the defendant said, "I suppose it's behind the settle."

Verdict for the plaintiff, with leave for the defendant to move to enter a nonsuit instead, on the ground that there was no evidence of any conversion.

Ludlow, Serjt. having obtained a rule *nisi* accordingly,

V. Lee appeared for the plaintiff; but upon reading the learned Judge's report, as above,

The rule was made

Absolute.

In a similar action by a sister of the plaintiff against the same defendant, it was proved that the defendant received parcels for carriers; that the parcels were accustomed to be placed behind the settle; and that when application was made for the parcel

(1) Referred to by WILLES, J. in C. P. 206, 211, 40 L. J. C. P. 141, *Wilkinson v. Verity* (1871) L. R. 6 144.—R. C.

in question, the defendant's wife said, "My husband has sent it, no doubt, by Croft, the carrier: he has a bad memory; it's a pity you did not speak to me."

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Verdict for the defendant.

V. Lee, in Easter Term, moved for a new trial, on the ground that the language of the wife shewed that the defendant had interfered by giving directions, which would amount to a conversion.

[850]

Sed per CURIAM :

What was there to go to the jury? Was there any thing but negligence? That will not support the action.

Rule refused.

BEALE AND ANOTHER v. SANDERS AND ANOTHER.

(3 Bing. N. C. 850—860; S. C. 5 Scott, 58; 3 Hodges, 147; 6 L. J. (N. S.) C. P. 283; 1 Jur. 1083.)

1837.
June 7.

[850]

Defendants having, as assignees under a void lease, for several years and up to the end of the term, possessed the premises by themselves or sub-tenants, and having up to within a few years of the expiry of the term, paid the reserved rent,—Held, liable to repair to the end of the term according to the covenant in the lease.

THE first count of the declaration stated that the defendants had become and were tenants to the plaintiffs of a certain brewery, messuage, stables, out-houses, and premises, situate, &c., and in consideration thereof they undertook and promised that they, the defendants, should and would, at their proper costs and charges from time to time, and at all times thereafter during their said tenancy, well and sufficiently repair, uphold, support, and maintain, mend and keep, the said brewery, messuage, stables, outhouses, and premises, and all and singular the erections and buildings then erected and built, and thereafter to be there n erected and built, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever, when, where, and as often as need or occasion should be and require, (fire, which might happen to destroy the said premises, or any part thereof, only excepted). The count then stated as a breach, that the defendants, after the making

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[*851]

of their said promise and undertaking, and during the continuance of their said *tenancy, wrongfully and unjustly suffered and permitted the said brewery, &c. to be ruinous, broken down, prostrated, and destroyed; and the same to remain and continue so ruinous, broken down, prostrated, and destroyed.

There was a second count for use and occupation of the same premises, and a count upon an account stated.

The defendants pleaded the general issue to the whole declaration, and three other pleas traversing the allegations in the first count.

At the trial before Tindal, Ch. J., at the sittings after Hilary Term, 1836; a verdict was found for the plaintiffs, subject to the opinion of the Court on the following case:

Theophilus Salway being seised in fee of the premises in question (then called the Burying Ground), on the 12th of August, 1756, by his will of that date, devised the same, together with several other landed estates, to his brother Richard Salway, for life; remainder to his first and other sons in tail; remainder to the Rev. Doctor Thomas Salway, for life; remainder to John Salway, son of the said Thomas Salway, and then a minor, for life; remainder to the first and other sons of the said John Salway, with remainders over: the devise contained, amongst other things, the following power of leasing; viz. "And I do hereby declare that it shall be lawful for the said several tenants for life, when and as they shall respectively come into possession of my said estates hereby devised by virtue of the limitations aforesaid, to make leases thereof for any term or number of years not exceeding twenty-one years, at the best improved rents that can be gotten, without taking any fine for making the same, so as such leases be made to take place in possession, and do contain usual covenants according to the nature of the estates, and so as the tenants do execute counterparts of their respective *leases. And I further empower the said tenants for life, when and as they shall respectively come into possession of my said estates as aforesaid, to make leases of such part thereof as consists of houses or ground in London, or in the county of Middlesex, for any term or number of years not exceeding sixty-one years, for the purpose of building, rebuilding,

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or substantially repairing the said estates, but without taking any fine for the granting such leases, and so as there be reserved thereon the best rent that can reasonably be got, according to the nature and circumstances of the case; and so as such leases do contain all proper and reasonable covenants; and so as the tenants do execute counterparts of their respective leases."

The said T. Salway, after making his will, died on the 1st of May, 1760, without revoking the same; and R. Salway, his brother, the first devisee for life as aforesaid, became possessed of the premises in question, and other the said devised estates, under and by virtue of the said devise.

On the 19th of July, 1763, by indenture of lease of that date, R. Salway demised the premises in question to one James Whalley for the term of twenty-one years, at the yearly rent of 5*l.*; and afterwards, by an indenture of lease, dated the 6th of July, 1769, made between said R. Salway of the one part, and George Upporn and Thomas Main of the other part,—after reciting the lease of the 19th of July, 1763; that by several mesne assignments the term thereby granted had become vested in one George Wheeler, who had died, and that it was then the property of his executors; and that the said executors, by indenture of lease bearing date the 29th of January, 1768, had demised the said premises, with all the erections and buildings thereon, to said G. Upporn and T. Main, for the residue of the said term of years, at the yearly rents, covenants, and agreements in *the underlease last aforesaid mentioned; and also reciting that G. Upporn and T. Main, since the granting of the lease to them, had erected and built several erections and buildings on the said premises for the better carrying on of their trade and business of soap-boilers; and for the better carrying on of their trade intended to erect and build several other erections and buildings on the said premises,—it was witnessed that the said R. Salway did demise and let the said premises unto G. Upporn and T. Main, their executors, administrators, and assigns, to have and to hold the same to them, their executors, administrators, and assigns, from the end and expiration of the term of twenty-one years, mentioned in the same hereinbefore recited indenture of lease granted by R. Salway to

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J. Whalley, for and during and until the full end and term of forty-six years, reserving a rent of 10*l*. And the said G. Upporn and T. Main, for themselves, their executors, administrators, and assigns, covenanted from time to time, and at all times thereafter, during the said term well and sufficiently to repair, uphold, cleanse, and keep the said piece or parcel of land, and all and singular the erections and buildings then erected and built, or thereafter to be erected and built, on the said premises, with the appurtenances thereinbefore demised, and every part and parcel thereof, in by and with all and all manner of needful and necessary reparations and cleansing whatsoever; and that, when, where, and as often as need or occasion should be and require: and the said piece or parcel of land, with the erections and buildings thereon erected and built, or to be erected and built, and other the premises being so well and sufficiently repaired, &c. at the end of the said term or other sooner determination of that demise, unto the said R. Salway, his executors, administrators, and assigns, peaceably and quietly to leave, surrender, and yield up; fire, &c. excepted.

[854]

Richard Salway, the said lessor, died on the 25th of July, 1775, and J. Salway became seised of the said premises, under and by virtue of the devise aforesaid, as tenant for life; remainder to his first and other sons in tail as aforesaid.

After a recovery suffered by him and his son, R. Salway, in 1795, the son in 1825 devised the premises to the plaintiffs, Thomas Beale and Job Walker Baugh, upon certain trusts in the will mentioned, and nominated them his executors. The said R. Salway afterwards died without revoking or altering his said will.

The lease of 1768 aforesaid, and the term of twenty-one years thereby created, and the indenture of 1769 aforesaid, and the term alleged to have been thereby created as aforesaid, afterwards vested in Samuel Sanders, by assignment.

By indenture, bearing date the 28th of September, 1795, made between Samuel Sanders of the one part, and John Oxley and Frederick Teash of the other part,—reciting, that by a certain indenture of lease, bearing date the 5th of September, 1781, made between the said S. Sanders of the one part, and

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James Haig, John Haig, and John White, distillers, of the other part, it was witnessed that, in consideration of 150*l.*, and for other the considerations therein mentioned, the said S. Sanders had demised and leased the premises in question with the buildings thereon, for fourteen years, at the yearly rent of 76*l.*, with a proviso for granting a further term at the end of the fourteen years; and reciting, that by virtue of several mesne assignments, the said recited indenture of lease, and the premises thereby demised, and all benefit and right of renewal therein, had become absolutely vested in the said J. Oxley and F. Teash, who had requested the said S. Sanders to grant them a lease for the term of forty years, to be computed from the date of the said indenture of lease, which the said *S. Sanders had agreed to do; and also to grant them a further term of eight years and three quarters therein, upon being paid the sum of 372*l.*,—it was, by the said indenture of the 28th of September, 1795, witnessed, that in consideration of the said sum of 372*l.* to the said S. Sanders, paid by J. Oxley and F. Teash, the said S. Sanders did demise the premises to J. Oxley and F. Teash, their executors, administrators and assigns, for the term of thirty-four years and three quarters from Michaelmas then next, at the annual rent of 76*l.*; which said last-mentioned indenture of lease contained, amongst others, the following covenant: viz. That J. Oxley and F. Teash would, at all times during the said term thereby granted, at their own costs and charges well and sufficiently repair, uphold, support, and keep the said premises by all needful and necessary reparations and amendments; and the premises with the appurtenances, at the end, expiration, or other sooner determination of the said indenture, would peaceably and quietly leave, surrender, and yield up unto S. Sanders, his executors, administrators, or assigns, together with the several fixtures and things mentioned and contained in the schedule thereunder written, (reasonable use, &c. excepted.)

[*855]

There was also a power of re-entry, if any of the covenants should not be kept.

The said S. Sanders, since deceased, received the said rent of 76*l.*, reserved by the last mentioned lease, annually until his decease, which happened on the 10th of July, 1815. The

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defendants received the said rent of 76*l.* from that period until Lady Day, 1830.

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The said S. Sanders paid the rent of 10*l.*, reserved by the herein-before mentioned indenture of lease of the 6th of July, 1769, from the year 1794 until his death; and the defendants afterwards paid the said annual rent of 10*l.* to the said R. Salway, until his *death in 1825; and they afterwards paid the plaintiffs the said rent from that period until Christmas, 1827; after which time they did not pay any rent for the premises.

In 1828 one Ayres, who was then in possession of the premises, began to pull down and destroy the buildings thereon then erected. About February, 1829, one Barton got possession of the premises; and all the buildings were afterwards destroyed; and at the commencement of the action the premises remained in the same state.

The question for the opinion of the Court was, whether the plaintiffs were or were not entitled to recover upon both or either of the counts of the declaration. If the Court should be of opinion that the plaintiffs were so entitled, then, inasmuch as the amount of damages was to be settled and determined by an arbitrator named by the parties, another question for the opinion of the Court would be, upon what principle the said damages should be calculated.

Archbold, for the plaintiffs:

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The lease of 1769, not having been made in pursuance of the power in the will of T. Salway, was void as against the remainderman: *Doe v. Cavan* (1); but as the defendants must be taken to hold over as tenants from year to year they are bound to repair, and are liable for permissive and commissive waste. For a tenant for years is subject to an action for waste: Litt. s. 67; though a tenant at will is not: *Gibson v. Wells* (2). *Brown v. Crump* (3), which may be cited against the plaintiffs, only decided that in a declaration it is not sufficient to rely on the mere relation of landlord and tenant as a consideration for imposing on the tenant the *obligation of repair, where it does

(1) 5 T. R. 567.

(N. R.) 290.

(2) 8 R. R. 801 (1 Bos. & P.

(3) 6 Taunt. 300; 1 Marsh. 567.

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not appear that the defendant is more than a tenant at will. In *Herne v. Bembow* (1), there was a lease without any covenant to repair; and the waste complained of was only permissive; here it is commissive; but the Court said, "Whatever duties the law casts on the tenant, the law will raise an assumpsit from him to perform."

At all events the defendants here, and their predecessors, having regularly paid the rent reserved by the lease of 1768, must be taken to have consented to hold on terms of that lease, and the rather, as they recited it in their under leases to Haig and James, and Oxley and Teash. In *Doe d. Rigge v. Bell* (2) it was held that if a landlord leased for seven years by parol, and agreed that the tenant should enter at Lady Day and quit at Candlemas, though the lease was void by the Statute of Frauds as to the duration of the term, the tenant held under the terms of the lease in other respects; and therefore the landlord could only put an end to the term at Candlemas. So, in *Richardson v. Gifford* (3), the declaration stated, that the defendant had become tenant to the plaintiffs, of premises, upon the terms that he should keep the premises in tenantable repair during the said tenancy; it was proved that he took the premises by written agreement, for three years and a quarter, and engaged to keep them in good repair during the time they should be in his occupation, but the agreement was neither stamped as a lease, nor signed by both parties: it was held that the defendant was bound by the covenant to repair, though the agreement was void, as to the duration of the term, by the Statute of Frauds; and that the count was applicable.

The damages therefore in the present case should be estimated on the same principle as if the plaintiffs had declared in covenant on the original lease.

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Wightman, for the defendants:

The declaration here only states, that the defendants held as tenants to the plaintiffs; and the mere relation of landlord and tenant is not sufficient to raise the liability to repair: *Brown v.*

(1) 4 Taunt. 764.

(3) 40 R. R. 253 (1 Ad. & El. 52).

(2) 2 R. R. 642 (5 T. R. 471).

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Crump. Conceding for the purpose of argument, that the defendants held under the terms of the lease of 1763, this declaration is not sufficient to charge them; it ought to have stated that they were tenants according to the terms of a certain lease. No sufficient consideration appears for the defendants' promise; and a tenant from year to year is not liable for permissive waste: *Gibson v. Wells*; *Herne v. Bembow*; *Torriano v. Young* (1); *Auworth v. Johnson* (2); *Horsefall v. Mather* (3). At all events the plaintiffs should have sued Ayres; for the defendants are not the original lessees; and there is nothing in this declaration to shew why the defendants should be liable for the act of Ayres.

(TINDAL, Ch. J. referred to *Powley v. Walker* (4).)

If the Court decide that the defendants held by the terms of the lease of 1769, they cannot be responsible beyond the duration of that lease, which expired in 1830. But the judgment should be arrested, on the ground that no consideration appears for the defendants' promise.

Archbold, in reply, contended that the decision of the Court must turn on the facts stated in the special case, and not on the declaration alone, which might have been amended if objected to at an earlier stage.

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TINDAL, Ch. J. :

The way in which this case strikes me, is, that the defendants are in possession of the premises in question under a lease which is void, as not having been made pursuant to the power in the will of the devisor. But the defendants, and those under whom they claim, have for several years paid the rent stipulated for by that lease, and therefore though the lease be void they must be taken to hold under the terms contained in it. That circumstance gets rid of the question, whether a tenant from year to year is liable for permissive waste, because the defendants are liable, according to the terms of the lease. That lease was granted in 1769, and expired in 1830. The rent reserved was 10*l.* yearly, which was

(1) 6 Car. & P. 8.

(3) 17 R. R. 389 (Holt, N. P. 7).

(2) 38 R. R. 821 (5 Car. & P. 239).

(4) 2 R. R. 619 (5 T. R. 373).

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paid by the original lessee, by Samuel Sanders, and afterwards by the defendants to 1827; while the defendants themselves received the improved rent of 76*l.* up to 1830. They must have believed, therefore, that they were holding on the terms of the original lease; and on the first count of the declaration there must have been a verdict for the plaintiffs; if so, the case of *Powley v. Walker* applies in support of the declaration; for in that case it was held, that the mere relation of landlord and tenant was a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner.

The implied assumpsit to repair, however, does not extend beyond the period of the lease; and the damages on that head should be estimated with reference to the state of the premises in 1830.

Under the count for use and occupation, the defendants will be liable for their continued possession.

PARK, J. :

Although the lease was void, yet, as the defendants held the premises to the end of the term, and continued to pay the rent, they are liable to all the stipulations contained in the lease in the same way as a *tenant who holds over upon the expiration of a valid lease. The repair should be estimated according to the damage sustained in 1830.

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VAUGHAN, J. concurred.

COLTMAN, J. :

In this case I think there is a substantial ground of action on which the plaintiffs are entitled to recover. The defendants must be considered as assignees under a void lease, which precludes the plaintiffs from suing in covenant; but the defendants occupied on the terms of that lease till it expired, and that furnishes the measure of damages with respect to the repairs; namely, the state of the premises in 1830.

The question on the sufficiency of the declaration is not without difficulty; but I think the declaration might be sustained after verdict. It is expressly averred that the defendants *were*

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tenants, which is a continuing and not a past consideration, and according to *Powley v. Walker* is a sufficient consideration for a promise to use a farm in a husbandlike manner.

Judgment for the plaintiffs.

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June 8.
[869]

JACKSON v. JACOB.

(3 Bing. N. C. 869—874; S. C. 5 Scott, 79; 3 Hodges, 219; 6 L. J. (N. S.) C. P. 315; 1 Jur. 262.)

A tender of payment by a purchaser in order to obtain an article purchased, is unnecessary where the vendor admits that the tender would be fruitless.

ASSUMPSIT on the breach of an agreement by the defendant to sell the plaintiff 50 Great Western Railway shares, at 37l. 10s. a share. The declaration alleged, that after the contract was made the plaintiff was ready and willing to accept the shares, and tendered the defendant the price.

The defendant pleaded among other things, that the plaintiff was not ready to receive the shares, and did not tender the price; upon which issue was joined.

[*870] At the trial before Patteson, J., last Liverpool Assizes, it appeared that the bargain was made on the 1st of December, 1836, by the plaintiff's broker, Batley, with *the defendant's brokers, Atkinson and Townley; that Batley having applied for the shares in vain, wrote to the defendant on the 10th of January, 1837, the following letter: "On the 1st of December ult., I purchased, on behalf of my friend Mr. John Jackson, fifty shares Great Western Railway, and which were sold to me by your brokers, Messrs. Atkinson and Townley, and for your account. After making repeated application to these gentlemen, by whom I have been put off from time to time, they now refer me to you, and I beg to say that unless the shares are delivered to-morrow I shall instruct my solicitor to proceed against you for the amount of the difference in value between the price at which I purchased the fifty shares and the market value of this day. I expect your answer by return."

On the 12th Batley tendered the price of the shares to Atkinson and Townley, who having had disputes with the defendant

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declined to receive the money, and told Batley he must apply to the defendant; Batley said at the trial, that it was the course of business to make the tender to the broker. On the same day that he made the tender, Batley received the following letter from the defendant: "I should have replied to your letter per return but that I expected to be in Liverpool but was unavoidably detained in Manchester; and since my arrival here have been engaged with my solicitors respecting a quantity of Westerns bought by me from a party in Bristol, at a low price. With regard to the fifty shares sold to you on my account by Messrs. Atkinson and Townley, the reason they have not been delivered has arisen from the defalcation of the party above alluded to. I do assure you I am most anxious to fulfil all my engagements, and will do my best to satisfy every one; all I require is a little time to arrange matters; and I think it is not asking too much in requesting, *under the circumstances, that such may be granted. At all events the market for Westerns is evidently falling; and if you are compelled to buy them in I request you will wait a short time, as I think you will get them at lower prices than the present; and any deficiency that may arise I shall endeavour to arrange, if time be given. In conclusion, I beg to state that the non-delivery of the shares is owing to the circumstances stated, and the heavy losses I have had to sustain within a very recent period. Mr. Townley is fully aware of the circumstances in Bristol, and can corroborate the same."

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The defendant was unable to procure the shares, or effect any arrangement, whereupon the present action was brought, and a verdict was found for the plaintiff on the plea of tender, as well as on other issues. Pursuant to leave reserved at the trial,

R. Alexander obtained a rule *nisi* to set aside the verdict and enter a nonsuit, on the ground that the brokers, Atkinson and Townley, had no authority to receive the price of the shares, and that therefore the tender to them was of no effect.

Cresswell and *Crompton* shewed cause:

The tender was not necessary; it was sufficient that the plaintiff was ready and willing to accept the shares: *Rawson v.*

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Johnson (1), Wms. Saunders, 320 a, note. The traverse of the tender was immaterial. But the brokers having made the contract, had sufficient authority to receive the price of the shares. Then, the defendant's letter of the 12th of January is a recognition of their agency, and a full admission of his own liability.

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Wilde, Serjt., R. Alexander, and Wightman, in support of the rule :

The traverse of the tender was material, and the issue ought to have been found for the defendant. An agent who sells in his own name may have authority to receive the price of the article sold, but a mere broker on the exchange has no such authority. The rule was laid down by Lord ELLENBOROUGH in *Blackburn v. Scholes* (2) : he says, " If a man sells goods, acting as a broker, the moment the sale is completed he is *functus officio*." And the brokers here, upon declining to receive the money, expressly referred the plaintiff's agent to the defendant himself. Now *Bingham v. Allport* (3) and *Wilmott v. Smith* (4) establish the position that where the person to whom the tender is made has no authority, or disclaims receiving the money, the tender is insufficient; and though it should be the course of business, as the witness said, to make the tender to the broker, that could only be where his principal is unknown.

TINDAL, Ch. J. :

The question is, whether the verdict which has been found for the plaintiff in this cause on the second plea ought to be disturbed; but it will be unnecessary for us to determine whether or not the tender was sufficient, for the ground on which I decide is, the correspondence between the defendant and Batley, from which it is manifest that the defendant had not the shares to deliver, and that the tender could only be a matter of form.

I do not rely on that as dispensing with the tender if it were necessary; but, on reading the defendant's letter, we do no great

(1) 6 R. R. 252 (1 East, 203).

(3) 38 R. R. 385 (1 N. & M. 396).

(2) 11 R. R. 723 (2 Camp. 341,
343).

(4) 31 R. R. 732 (Moo. & Mal. 238;
3 Car. & P. 453).

violence to the context in assuming it as an admission that a tender would be fruitless. *Upon the plaintiff's agent writing to say, that unless the shares were delivered on the morrow, a solicitor would be instructed to proceed for the amount of the difference in value between the price at which the shares were purchased, and the market value of the day, the defendant answers, "With regard to the fifty shares sold to you, the reason they have not been delivered has arisen from the defalcation of a party in Bristol. I am most anxious to fulfil my engagements; all I require is a little time to arrange matters." That seems to admit that a contract had been entered into at some price agreed on between the parties, and that a demand of the shares had been made in a form which precluded any objection as to the readiness and ability of the purchaser to pay for them. It is like the case where the indorser of a bill, on promising to pay the holder, admits thereby that all the preliminary steps have been taken to render the indorser liable. Upon this ground I think the rule should be discharged.

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PARK, J. :

I shall not enter into the question, whether a tender to a broker is a good tender, or whether a party authorised to sell is also authorised to receive payment. But, looking at the defendant's letter, I think it clear he knew that a tender had been made to his broker, and that he had no objection to urge as to the want of authority in the broker. If any such objection had occurred to him he would have said in his letter that Atkinson and Townley were not his agents to receive payment.

VAUGHAN, J. :

I am of the same opinion. When the defendant's letter does not disclaim the agency of Atkinson and Townley, but asks for time to arrange matters, the inference is that the brokers had authority to act in the business.

COLTMAN, J. :

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I do not say that a broker employed to sell, has in all cases authority to receive payment; nor is there any question here as

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to the custom of the place in that respect: the question is, what was the understanding and agreement of the parties? Now the broker only says that he will have no more to do with the business; and the principal, instead of denying the authority of the broker, says he is anxious to fulfil his engagements, and only requires a little time. Having omitted to object then, he cannot turn round now and say the broker had no authority.

Rule discharged.

1837.
June 9.

IN THE MATTER OF THE ARBITRATION BETWEEN RIDER
AND ANOTHER AND FISHER.

[874]

(3 Bing. N. C. 874—877; S. C. 5 Scott, 86; 3 Hodges, 222; 1 Jur. 406.)

In a dispute upon a building contract, arbitrators were to award on alleged defects in the building, on claims for extra work, and deductions for omissions; and to ascertain what balance, if any, might be due to the builder: An award, ordering a gross sum to be paid to the builder, without any decision on the alleged defects: Held, ill.

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AWARD. The bond of arbitration,—after reciting that the therein named Thomas Rider the elder, and Thomas Rider the younger, some time since entered into a contract with R. Fisher to erect and build for the said Fisher a house, offices, and outbuildings, at Bentworth, and to perform the whole of the works with the best description of materials, and to finish the same in a good, sound, complete, substantial, and workmanlike manner, and to leave the whole of the building with the several works in the most complete and perfect state; and that the said Rider the elder, and Rider the younger, did, in pursuance of the said contract, erect a house, offices, and outbuildings, at Bentworth aforesaid; but which house, offices, and outbuildings, it was alleged by the said Fisher, had been found to be *in a defective and imperfect state in several parts and particulars, both in respect of materials and workmanship; and that divers differences and disputes had arisen, and were then depending, between the said Rider the elder, and Rider the younger, and the said Fisher, in respect of such alleged defects and imperfections; and that the said Rider the elder, and Rider the younger, had made claims for extra work, and

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deductions in regard to omissions, but of which no detailed accounts had been furnished to the said Fisher, and that he was unable to judge of the accuracy thereof,—set forth, that it had been agreed by and between the said Rider the elder, and Rider the younger, and the said Fisher, that for the purpose of settling, judging, and determining of all such alleged defects and imperfections, and what, if anything, was necessary to be done to put the said house, offices, and outbuildings, in a perfect condition, in conformity with the original drawings and specifications upon which the buildings were authorised to be executed, and according to the intent and meaning of the said contract, and for ending all differences and disputes, it should be referred to certain arbitrators therein named, to arbitrate, award, judge, and finally determine concerning all claims, differences, and disputes, relating to such alleged defects and imperfections aforesaid, both in materials and workmanship in the said house, offices, and outbuildings, at Bentworth aforesaid, and likewise relating to the accuracy of such claims for extra work, and deductions for omissions, and to ascertain what, if any, balance might be due to the said Rider the elder, and Rider the younger, in respect of such extras and omissions.

The arbitrators awarded, that the said Fisher should forthwith well and truly pay, or cause to be paid, unto the said Rider the elder, and Rider the younger, the full sum of 296*l.*, without any deduction or abatement *whatsoever: and that the same should be received by the said Rider the elder, and Rider the younger, in full satisfaction and compensation of and for all the matters in difference between them, and so referred to them the said arbitrators as aforesaid.

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A rule *nisi* was obtained to set aside the award as not containing any decision on the subject of the alleged defects and imperfections in the building which the arbitrators were expressly directed to inquire into.

Taddy, Serjt. and *Saunders*, who shewed cause, contended that the award was sufficiently final in ordering Fisher to pay a sum of money. If there were any defects, it must be taken

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that the sum awarded was due to the builders after allowing for such defects.

(TINDAL, Ch. J. : The omission to specify the defects might render Fisher subject to costs he would otherwise be exempt from.)

The case is similar to *Cargey v. Aitcheson* (1) and *Dicas v. Jay* (2), where awards which ordered a sum to be paid by one of the parties, as the result of conflicting claims, were held sufficiently certain: and, in such a case, the costs should be defrayed by the party against whom the arbitrators decide: *Dibben v. Marquis of Anglesey* (3).

Wilde, Serjt., in support of the rule, contended that the award was not final without a decision on the alleged defects, and that it could not be ascertained whether the 296*l.* was to be paid for extra work, or as a general balance after allowing for omissions and defects: until that was pointed out it could not be determined who was entitled to the costs.

TINDAL, Ch. J. :

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Upon reading the order of reference and the award, it appears the arbitrators have not done *that which they were authorised and required to do. They were to determine concerning all claims, differences, and disputes, relating to the alleged defects in the building, relating to the charge for extra work, and to deductions for omissions; and to ascertain what balance might be due in respect of the extras and omissions.

On the award they have taken no notice of the two first subjects of dispute; and it remains doubtful whether the 296*l.* awarded is to be applied in discharge of extra work or to a general balance of account.

Rule absolute.

(1) 26 R. R. 298 (2 B. & C. 170).

(3) 10 Bing. 568.

(2) 5 Bing. 281.

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(3 Bing. N. C. 883—892; S. C. 5 Scott, 213; 3 Hodges, 224; 6 L. J. (N. S.) C. P. 258.)

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June 9.
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1. Plaintiff having issued execution against L. for debt, L., with the assent of plaintiff, conveyed all his property to defendant, who thereupon undertook to pay plaintiff the debt due from L., plaintiff withdrawing the execution: Held, that the defendant's undertaking was not an undertaking to pay the debt of a third person, within the meaning of the Statute of Frauds.

2. "I wish I could comply with your request, for I am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it; my hope is, that out of the present harvest you will be paid:" Held, in a letter, a sufficient acknowledgment to revive a debt barred by the Statute of Limitations (1).

In this action for money had and received, work and labour, and upon an account stated, the plaintiff having recovered a verdict for 488*l.* 12*s.* 7*d.*,

Maule moved for a rule to reduce the verdict by the sum of 340*l.* 6*s.* 10*d.*, upon an objection raised on the Statute of Frauds, under the following circumstances:

In 1828, Lloyd, the defendant's brother-in-law, owed the plaintiff 340*l.* 6*s.* 10*d.*, for which the plaintiff held Lloyd's warrant of attorney.

Lloyd becoming embarrassed, the plaintiff signed judgment, and sued out a *fi. fa.*

Several other creditors having demands upon Lloyd, the defendant looked into Lloyd's accounts, in which he found the debt due to the plaintiff, and offered 10*s.* in the pound by way of composition. The plaintiff refused to compound on those terms, when, with the assent of all parties, Lloyd's property, a farm and farming stock, was, in May, 1829, conveyed to the defendant to his own use, by bill of sale, the defendant undertaking in return, as appeared by the recital of the deed, to satisfy Lloyd's creditors.

The consideration for the sale mentioned in the deed was 3,083*l.* 11*s.* 8*d.*, the sum being composed of debts owing by Lloyd, including the plaintiff's 340*l.* 6*s.* 10*d.*

The plaintiff was the attesting witness, and thereupon withdrew

(1) *Cp. Morrell v. Frith* (1838) 3 M. & W. 402.

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his execution: Lloyd was discharged from his *debts, and continued to manage the property as bailiff to the defendant. In May, 1832, the plaintiff presented an account to the defendant, the accuracy of which the defendant, on seeing it, acknowledged, and which contained among other charges, this item of 340*l.* 6*s.* 10*d.* The aggregate total of this account was cast up in the defendant's hand-writing. Lloyd, who was called as a witness, proved that it was one of the debts included in the 3,083*l.* 11*s.* 8*d.*; that the defendant undertook to pay it; and that it was agreed Lloyd should be discharged. This the jury found to be the case.

The objection now made was that the defendant was sued in respect of the debt of a third person, for which he could not be liable, unless under some writing by which he should have engaged to pay it.

A nonsuit was also moved for, on the ground that the plaintiff's claim was barred by the Statute of Limitations, unless the following letter, written by the defendant to the plaintiff on the 10th of August, 1832, were sufficient to revive the debt.

"I am in receipt this day only, of yours of the 22nd inst. I do wish I could comply with your request, for really I am, and have been very wretched indeed, on account of your account not being paid: I hear there is a prospect of an abundant harvest, which surely must turn into a goodly sum, and very considerably reduce your account; at all events, if it does not, the concern must be broken up to meet it at last. I have this week paid Lechmere & Co. very near 500*l.* on account of Lloyd, not a farthing of which I ever expect again, having before paid on the same account more than the value of the security I hold. It is really a calamity to be so connected. It is impossible any one can be more sensible than I am of your kindness towards Lloyd's family; and my hope is, that out of the present harvest you will be paid."

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PARKE, B., at the last Worcester Assizes, held the letter sufficient, but left it also to the jury to say what was the effect of the letter (1), and whether it related to all the debts due from the defendant to the plaintiff. The jury held that it did. But the

(1) As to this practice, see *per* PARKE, B., 3 M. & W. at p. 406, explaining that he did not himself approve it.—F. P.

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defendant relied on *Whippy v. Hillary* (1), where it was held that the Statute of Limitations was not barred by a letter in which the defendant stated, "that family arrangements had been making to enable him to discharge the debt; that funds had been appointed for that purpose, of which A. was trustee; that the defendant had handed the plaintiff's account to A.; that some time must elapse before payment, but that the defendant was authorised by A. to refer the plaintiff to him for any further information;" for, by the statute 9 Geo. IV. c. 14, s. 1, the acknowledgment in writing to bar the statute must be signed by the party chargeable thereby; and such a letter did not charge the defendant. Here, the defendant did not mean to charge himself, but merely the produce of the harvest; and the letter was insufficient, because it did not specify the amount of the debt to be paid. Thus, in *Kennett v. Milbank* (2), the defendant, by a deed reciting that he was indebted to the plaintiff and others, assigned his property to the plaintiff, in trust to pay all such creditors as should sign the schedule of debts annexed; provided that if all did not sign, the deed should be void: the plaintiff never signed, nor was the amount of his debt stated: this was held not a sufficient acknowledgment to take the plaintiff's debt out of the Statute of Limitations, although it was admitted orally that he had but one debt.

It was contended also that the Judge at Nisi Prius should himself have decided on the effect of the letter, and not have left it to the jury.

A rule *nisi* having been granted,

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Wilde and Ludlow, Serjts. with *Godson*, shewed cause:

They contended that this was no engagement to pay the debt of a third person; but that, the defendant with the consent of all parties, had taken as his own debt, the debt due from Lloyd to the plaintiff, for which the plaintiff's renunciation of his judgment security, and the defendant's acquisition of Lloyd's property was ample consideration.

With respect to the Statute of Limitations, they relied on the

(1) 37 R. R. 450 (3 B. & Ad. 399).

(2) 8 Bing. 33.

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letter as a sufficient acknowledgment of the debt, and referred to *Lloyd v. Maund* (1), *Dodson v. Mackey* (2), *Frost v. Bengough* (3), *Beale v. Nind* (4), *Dabbs v. Humphries* (5), *Lechnere v. Fletcher* (6), and *Dickenson v. Hatfield* (7), in answer to the objections on the other side.

Talfourd, Serjt. and *R. V. Richards*, in support of the rule for a nonsuit, relied on *Whippy v. Hillary* and *Kennett v. Milbank*. With respect to the objection on the Statute of Frauds, they contended that the plaintiff if he failed in the present action, might still sue Lloyd, and that, therefore, the defendant was called on to pay the debt of another without any writing under which he had engaged to do so.

TINDAL, Ch. J. :

Two questions have been raised in this case: one on the Statute of Limitations, which, it is contended, is a bar to the whole action; the other, on the Statute of Frauds, which applies to 340*l.* 6*s.* 10*d.* only of the whole demand.

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In answer to the objection on the Statute of Limitations, the plaintiff relies on the defendant's letter of *the 4th of August. The inference I draw from that letter is, that it amounts to an acknowledgment of the plaintiff's demand and a promise to pay it. And though it points out a source of payment, I cannot say that it confines the creditor to the source indicated. "I hear there is a prospect of an abundant harvest which surely must turn into a goodly sum, and very considerably reduce your account." That is the natural language of a man expressing the ground of a hope, that the delay in the payment of the debt would end. It then goes on, "at all events if it does not, the concern must be broken up to meet it at last;" that is, that at all events the debt must be ultimately redeemed. The first objection taken for the defendant is, that it was left to the jury to say what was the effect of the letter. But by a chain of cases

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| (1) 2 T. R. 760. | (5) 10 Bing. 446. |
| (2) 8 Ad. & El. 225, n.; 4 N. & M. 327. | (6) 38 R. R. 688 (1 Cr. & M. 623). |
| (3) 25 R. R. 621 (1 Bing. 266). | (7) Moo. & Mal. 141; 5 Car. & P. 46; 1 M. & Rob. 141. |
| (4) 4 B. & Ald. 568. | |

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from *Lloyd v. Maund* to *Frost v. Bengough* and others, it appears that such has been the constant course; and if it were otherwise, the objection could not prevail here, because the learned Baron did state that he thought the letter a sufficient acknowledgment, and in that opinion this Court concurs. The other objection is, that the acknowledgment is imperfect because the amount of the debt due is not stated. If that were a new point, perhaps some doubt might exist; but on looking at the case of *Lechmere v. Fletcher* (1) the language of Mr. Baron BAYLEY appears to have settled the question, "The statute of 9 Geo. IV. c. 14, s. 1, does not, in terms, state any thing as to the necessity of specifying the amount, either in an acknowledgment or promise: it says only, that in actions of debt or upon the case, grounded on any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the enactments of the 21 Jac. I. c. 16, unless such acknowledgment or promise be made, or contained by or in some writing, signed by the party chargeable thereby." The language of the Act of Parliament certainly does not lead to the conclusion that such specification is necessary; and, upon looking into the authorities, we do not think that they militate against the conclusion at which we have arrived, that a general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations.

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The objection then on the Statute of Limitations being answered, ought the verdict to be reduced by the amount of the sum which is contended to be the debt of a third person?

The facts are, that the plaintiff was a creditor of Lloyd's for 34*l.* 6*s.* 10*d.*, for which amount he held a warrant of attorney: Lloyd becoming embarrassed, the plaintiff signed judgment and sued out execution; and other creditors had similar claims upon Lloyd: the defendant then on behalf of Lloyd, endeavoured to make terms, and offered the plaintiff 10*s.* in the pound: but the plaintiff refusing to accede, the defendant looked accurately into Lloyd's accounts in March, 1829, and among other debts, became

(1) 38 R. R. 688 (1 Cr. & M. 623).

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apprised of the amount of this which was due to the plaintiff. Then, in May, 1829, Lloyd conveys all his property to the defendant to his own use, the defendant undertaking to pay Lloyd's creditors. Matters go on in this way for some years, Lloyd acting as bailiff to the defendant, when in May, 1832, an account is stated between the plaintiff and the defendant, the first item of which is this sum of 340*l.* 6*s.* 10*d.*; the aggregate total is cast up in the hand-writing of the defendant, who makes no objection, but says, "all these sums we owe to Bird."

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*It appears then that the plaintiff, with the consent of Lloyd and the defendant, had relinquished his execution against Lloyd, to look to the defendant; that the defendant admitted his liability when the account was presented; and that the jury found such to have been the agreement between the parties. No objection, therefore, can be raised on the Statute of Frauds, for this is not an agreement to pay the debt of a third person; but an agreement that if the plaintiff would forego his claim on Lloyd, the defendant would pay the amount of the debt on his own account. The case, therefore, falls within the principle of *Read, executor of Tuack, v. Nash* (1), where a cause being at issue, the record entered, and just coming on to be tried, the defendant Nash, being then present in Court, in consideration that Tuack would not proceed to trial, but would withdraw his record, promised to pay Tuack 50*l.* and the costs in that suit to be taxed till the time of withdrawing the record: Tuack relying upon this promise did withdraw his record, and no further proceeding was had in that cause; Tuack being dead, Read, his executor, brought his action upon that special promise and undertaking by Nash: and it was held that this was no promise to answer for the debt, default, or miscarriage of another; but an original promise, sufficient to found an assumpsit upon against Nash.

It is objected that the plaintiff, if he fails in this action, may still sue Lloyd, or issue execution; but if he were to do so, Lloyd might shew on plea or *auditâ querelâ*, that on good consideration, the plaintiff gave up his remedy against Lloyd, and took the defendant's liability instead; which, though not properly accord and satisfaction, would be a complete defence on the general

(1) 1 Wils. 305.

*issue: *Good v. Cheesman* (1); and the cases there cited. I think, therefore, this rule must be discharged.

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PARK, J.:

The objection on the Statute of Limitations is answered by the cases which have been cited for the plaintiff. But it is impossible to read the defendant's letter, without seeing that it is an acknowledgment of the debt. The payment is not to be conditional on the event of a good harvest; but that is only mentioned as a reason for hope. In *Whippy v. Hillary* (2), the defendant referred to a fund vested in trustees, over which he had no control. As to the objection that the letter specifies no definite sum, from *Lloyd v. Maund* (3) to *Lechmere v. Fletcher* (4), that has been held unnecessary. In *Lechmere v. Fletcher*, Mr. Baron BAYLEY distinguishes *Kennett v. Milbank* (5), on the ground that "the plaintiff did not execute the deed. The deed did not specify the plaintiff's debt; it did not appear that it applied to the debt on the note. Now, as an acknowledgment is only evidence of a promise, some of the Judges of the Common Pleas were of opinion, that the deed was not evidence of any new promise; the creditors had not signed, and the deed was void. Others of the Judges put it on the ground that there was no acknowledgment of the debt for which the plaintiff was suing; and, if there were no acknowledgment of that, then there could be no fresh promise to pay that debt. The opinion of all the Judges who decided that case was, that the deed did not raise any promise, or amount to an acknowledgment from which a fresh promise could be implied." But *Frost v. Bengough* (6), *Smith v. Forty* (7), and other cases, are all uniform on this point; and in *Dickenson v. Hatfield* (8), *Lord TENTERDEN held the admitting a balance to be sufficient, without naming any particular sum.

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Then, as to the 34*l.* 6*s.* 10*d.*, there was a good consideration for the bill of sale executed by Lloyd; all the creditors concurred in the arrangement; the plaintiff was an attesting witness; and

(1) 36 R. R. 574 (2 B. & Ad. 328).

(2) 37 R. R. 450 (3 B. & Ad. 399).

(3) 2 T. R. 760.

(4) 38 R. R. 688 (1 Cr. & M. 623).

(5) 8 Bing. 38.

(6) 25 R. R. 621 (1 Bing. 266).

(7) 34 R. R. 774 (4 Car. & P. 126).

(8) 1 Moo. & Rob. 141; 5 Car. &

P. 46; Moo. & Mal. 141.

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Good v. Cheesman is a sufficient authority to shew that Lloyd was discharged, and that an assumpsit to the amount of the debt was cast upon the defendant.

VAUGHAN, J. :

With respect to the defendant's letter, a series of cases from *Lloyd v. Maund* (1) to *Frost v. Bengough*, have decided that the effect of the letter may properly be left to the jury. But here, the presiding Judge expressed his own opinion also. The language of the letter is a direct acknowledgment of debt; and it is not necessary that the precise amount should be stated. *Lechmere v. Fletcher* shews that the amount may be proved by extrinsic evidence.

With respect to the 34*l.* 6*s.* 10*d.*, it would be great injustice to suppose that Lloyd could be liable again: he gave up the whole of his property, not in trust, but absolutely to the defendant, upon his undertaking to satisfy the debts. *Good v. Cheesman* is a decisive authority to shew that Lloyd was discharged.

COLTMAN, J. :

As to the 34*l.* 6*s.* 10*d.*, there is no difficulty: if debtor, creditor, and a third party agree that the third party shall be substituted for the debtor, the debtor is exonerated. *Fairlie v. Denton* (2) has decided that, establishing to that extent an exception to the rule, that debts cannot be assigned. If the plaintiff had sued Lloyd, or issued execution, he would have had a good answer by plea or *audita querelâ*: *Good v. *Cheesman*. With respect to the objection on the Statute of Limitations, I rely on the defendant's letter as an answer; and *Lechmere v. Fletcher* is a decisive authority, that the precise sum due need not be specified. Where the terms of the letter are equivocal, it is proper the jury should say whether it applies to the debt in question, and is an absolute or a conditional promise to pay. But if we were to decide for ourselves, I should say that the language of the defendant's letter imports a request of forbearance, but no condition.

Rule discharged.

(1) [Disapproved on this point, 402, 406.—F. P.]
Morrell v. Frith (1838) 3 M. & W. (2) 8 B. & C. 395.

PASCOE AND ANOTHER *v.* J. PASCOE.

(3 Bing. N. C. 898—907; S. C. 5 Scott, 117; 3 Hodges, 188; 6 L. J. (N. S.) C. P. 322.)

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To avowry for rent arrear, plea, that by the demise in the avowry mentioned, avowant demised and transferred the premises to plaintiff for the residue of avowant's term and interest in the same, and that avowant had not, at the time when, &c., any reversionary interest in the premises, after the expiration of the term granted to plaintiff by the demise: Held, sufficient.

Replication: a power of distress given by the award of an arbitrator to whom all matters in difference between the parties had been referred: Held, ill, without averring that the arbitrator had authority to confer a power of distress, or that the right to distrain was one of the matters in difference.

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Avowry and cognizance, first, that the plaintiffs for a long time, to wit, for all the time during which the rent hereinafter mentioned to be distrained for, was accruing due, and from thence until and at the time *when, &c., held and enjoyed the premises in which, &c., with the appurtenances, as tenants thereof to J. Pascoe the younger, by virtue of a certain demise thereof to the plaintiffs theretofore made at and under a certain yearly rent, to wit, the yearly rent of 32*l.* payable half-yearly. Distress for 80*l.* rent arrear. Secondly, that the plaintiffs, for the space of two years and upwards next before and at the time of making the agreement hereinafter mentioned, held and enjoyed the premises, as tenants thereof to the said J. Pascoe the younger, by virtue of a certain demise thereof to the plaintiffs theretofore made, at and under a certain yearly rent, to wit, the yearly rent of 36*l.* payable half-yearly: that before the making of the said agreement, to wit, on the 21st of September, 1831, the said J. Pascoe the younger had caused to be distrained on the said premises divers goods and chattels for the sum of 36*l.* arrears of rent due on the 24th of June, then last past, to the said J. Pascoe the younger, and the plaintiffs had replevied the said goods and chattels, and commenced an action against J. Pascoe the younger in the sheriff's court of Cornwall, which action of replevin was afterwards removed by virtue of a writ of *recordari facias loquellam* from the said sheriff's court to the Court of King's Bench, and was then pending: that disputes and differences

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having arisen and being subsisting between the said parties relative to the said distress and action at law, and other matters relative to the said premises, particularly as to the amount of the yearly rent which should be paid for the said estate, the plaintiffs and J. Pascoe the younger, for the ending and determining thereof, did before the said time when, &c., to wit, on the 29th of June, 1832, by a certain agreement in writing then made between the said J. Pascoe the younger and the plaintiffs, mutually and reciprocally agree with each other that as well the matters *aforesaid as all other matters in difference between the said parties, and more particularly the amount of the rent which should be paid for the said premises, should be, and the same were thereby submitted and referred to the award, arbitrament, final end, and determination of Robert Julian, whose award was to be final and conclusive, both at law and in equity, as well on the part and behalf of J. Pascoe the younger, as on the part and behalf of the plaintiffs, to settle and ascertain the same, and to award, order, and determine by his award what he should think fit to be done and performed by the said parties respectively, respecting the several matters aforesaid; so as the said arbitrator should make and publish his award in writing indented, under his hand and seal, of and concerning the premises, ready to be delivered to the said parties or such of them as should desire the same, on or before the first day of August then next, unless he should be prevented from so doing by sickness or some other unavoidable event. That the said R. Julian having taken upon himself the charge of the said award, and having heard the allegations and proofs of both the said parties, did afterwards, and within the time limited for making his award, and before the said time when, &c., to wit, on the 1st of August, 1832, aforesaid, make and publish his award in writing indented, under his hand and seal, between the said parties, upon, and concerning the premises aforesaid; and did thereby (amongst other things) award, order, and determine, that from and after Midsummer then last, the plaintiffs should pay to J. Pascoe the younger, for the premises in which, &c., the sum of 32*l.* per annum, instead of the sum of 36*l.* per annum, before paid, by half-yearly payments, that is, at Christmas and

Midsummer in every year, so long as they should continue to hold the said premises, and that the said J. Pascoe the younger should have power of distress for *recovery of the said rent of 32*l.* per annum: as by the said award reference being thereunto had would more fully appear: of which said award the plaintiffs afterwards, to wit, on, &c. had notice. That the plaintiffs, from the time of making the said award, until and at the said time when, &c. held and enjoyed the premises in which, &c. with the appurtenances, as tenants thereof to the said J. Pascoe the younger, at and under a certain yearly rent, to wit, the said yearly rent of 32*l.* payable half-yearly, on the 24th of June and the 25th of December in every year, by even and equal portions: and that the said J. Pascoe the younger, by means of the premises, had for and during all the time last aforesaid, such power of distress as aforesaid. Distress thereupon, for the sum of 64*l.* for two years' rent so due and in arrear as aforesaid.

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Pleas in bar to each of the avowries and cognizances, That by the said demise in the said avowry and cognizance mentioned, the said J. Pascoe the younger did demise and transfer the said premises with the appurtenances in which, &c., unto the plaintiffs, for all the residue and remainder of his the said J. Pascoe the younger's estate, term, and interest, of and in the same, and that the said J. Pascoe the younger had not then or at the said time when, &c., or at any time during the said demise to the plaintiffs, any reversionary estate, term, or interest, of or in the premises with the appurtenances in which, &c., or any part thereof, expectant upon or to take effect upon, or at any time after the expiration of the term granted to the plaintiffs by the said demise; and that, the plaintiffs were ready to verify, &c.

In the replications to the pleas in bar the avowant relied on the award set forth in the second avowry and cognizance.

Rejoinders, that it was not referred to the said R. Julian, whether J. Pascoe the younger should have power of distress for recovery of the said rent of 32*l.* per annum; *and that, the plaintiffs prayed might be enquired of by the country, &c.

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Demurrer, for that the plaintiffs had in and by their said rejoinders, stated and attempted to put in issue a fact not alleged by the defendant in his replication, and wholly irrelevant

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and immaterial, to wit, that it was not referred to the said R. Julian, whether J. Pascoe the younger should have a power of distress for recovery of the said rent of 32*l.* per annum. And also, for that the said rejoinder containing new matter, the plaintiffs should have concluded the same with a verification, and not by praving that it might be enquired of by the country. Joinder.

The case was argued in Hilary Term by

Stephen, Serjt. for the avowant :

The rejoinders, which are a departure from the pleas in bar, raise an immaterial issue, and the pleas in bar, which are informal, as amounting to the general traverse of *non tenuit*, are no answer to the avowry: the pleas admit rent to be due, which must be at least rent seck; and for rent seck as well as rent service and rent-charge, distress lies: 4 Geo. II. c. 28, 2 Bl. Comm. 42. But the pleas admit tenure, and the rent due, and consequently service: Litt. s. 122, 213, 214, Co. Litt. 142. And yet they deny tenure because they shew an assignment: *Palmer v. Edwards* (1), *Poultney v. Holmes* (2), Litt. s. 215, 255, Co. Litt. 150 b. They are therefore repugnant; and repugnancy is a substantial objection: Doctr. Placit. 326, *Butt's case* (3). The cases therefore which decide, that where there is no reversion there is no distress, — *v. Cooper* (4), *Parmenter v. Webber* (5), have no bearing here. That question cannot be raised on a plea in this form, which admits tenure *and rent service. In *Preece v. Corrie* (6), which may be cited for the plaintiffs, the plea did not admit tenure: and in *Parmenter v. Webber*, the supposed demise turned out to be a complete assignment of the whole of the lessor's interest in the premises.

[* 903]

Ogle, for the plaintiffs, contended that this case could not be distinguished from *Preece v. Corrie*, where the avowant, who had a term which expired on the 11th of November, 1826, let the premises orally from the 11th of September to the 11th of November in that year, for 270*l.*, payable immediately; it was

(1) Doug. 187, n.

(2) 1 Str. 405.

(3) 7 Co. Rep. 23.

(4) 2 Wils. 375.

(5) 20 R. R. 575 (8 Taunt. 593; 2 Moore, 656).

(6) 30 R. R. 536 (5 Bing. 24).

held, that that was a lease of which parol evidence might be given, and not an assignment requiring a writing; but that being a demise of the whole of the avowant's interest, he had no right to distrain. He also relied on *Parmenter v. Webber*, where the assigning of the landlord's whole interest in a term, to the plaintiff, was held to be evidence to support the plea of *non tenuit*.

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With respect to the award, even if the submission embraced the point, which was not averred, the arbitrator could not confer a right of distress, or give the avowant a title he did not otherwise possess: *Marks v. Marriott* (1), *Hunter v. Rice* (2), 1 Roll. Rep. 270.

Stephen, in reply :

Although the arbitrator cannot confer title or power to distrain, he may decide on its existence; and the tenant is estopped to deny it after such decision: *Doe d. Morris v. Rosser* (3).

Cur. adv. vult.

TINDAL, Ch. J. :

In this replevin, the defendant has made two avowries and cognizances. The first is in the general form given by the statute 11 Geo. II. c. 19 (4), *that the plaintiffs held the premises in which, &c. as tenant to Pascoe the younger, under a demise thereof to them made for a certain term, and then avows for two years' rent in arrear. To this avowry the plaintiffs have pleaded in bar, that by the demise in the avowry and cognizance mentioned, Pascoe the younger demised and transferred the premises in which, &c. to the plaintiffs, for all the residue and remainder of his (the lessor's) estate, term, and interest of and in the same, and that he, the said Pascoe the younger, had not then, or at the said time when, &c. or at any time during the demise, any reversionary estate, term, or interest in the same. The defendant has replied to this plea in bar, a power of distress given to Pascoe the younger by the award of an arbitrator to whom certain disputes and all matters in difference between him and the plaintiffs had been referred. The plaintiffs, in their rejoinder to this

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(1) 1 Id. Ray. 115.

(2) 13 R. R. 394 (15 East. 100).

(3) 3 East, 15.

(4) Ss. 22 and 23 of this Act are repealed by 44 & 45 Vict. c. 59, s. 3, and 46 & 47 Vict. c. 49, s. 4.

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replication, allege, that it was not referred to the arbitrator, whether the defendant Pascoe the younger should have a power of distress: to which rejoinder the defendant demurs specially.

Upon this state of the pleadings it is obvious, that the defendant's replication to the plea in bar would be bad upon general demurrer, on the ground of departure; the defendant, in his avowry and cognizance, relying upon the common law right to distrain as for rent service, and in his replication setting up a power of distress given under an award. The question, therefore, so far as the first avowry and cognizance are concerned, becomes this, whether the plea in bar affords any legal answer thereto. This question is to be determined, as if it were upon a general demurrer to the plea in bar, and, therefore, no objection can be available, which amounts to matter of form only, such as that the plea in bar is, in effect, no more than the general traverse *non tenuit*, or *non demisit*; and looking at the substantial *allegations in the plea in bar, we think it alleges with sufficient certainty that Pascoe the younger, at the time of making the demise, did not reserve any reversion in himself, and, consequently, without any express provision for that purpose, has no remedy by distress. The authorities to this point are collected in Bacon's Abr. tit. Distress, A.

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And as to the argument, that the plea in bar is incongruous, inasmuch as it admits a demise, but sets up an assignment, we cannot distinguish it from that in *Preece v. Corrie* (1), which was held to be a good plea in bar; nor from the authority of the decision in *Parmenter v. Webber* (2), where the assigning of the landlord's whole interest in a term to the plaintiff was held to be evidence which supported the plea of *non tenuit*. For, although it is true, that this rent may be a rent seck, and that the remedy is the same under the statute for a rent seck as for a rent service, yet the avowry is for a rent service at common law, and not for a rent seck. So far, therefore, as relates to the first avowry and cognizance, and the pleadings dependent thereon, we think the plaintiffs are entitled to judgment.

The second avowry and cognizance rests upon a power of

(1) 30 R. R. 536 (5 Bing. 24).

(2) 20 R. R. 575 (8 Taunt. 593;
2 Moore, 656).

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distress given by an award under an agreement entered into between the plaintiffs and the defendant Pascoe the younger, by which certain disputes and differences relative to a distress which had been then made, and an action at law then depending, and all other matters in difference between the said parties were submitted to the arbitration of Mr. Julian. The plaintiffs pleaded in bar to this the very same matter which they had pleaded in bar to the first avowry, viz. that Pascoe the younger had demised to them all the residue and remainder of his own estate, term, and interest *in the premises in which, &c., and that he had no reversionary interest in himself. To this plea in bar, the defendant replies the very same matter as that contained in the second avowry, viz. the power of distress given by the arbitrator; and the plaintiffs rejoin, thereto, that the giving such power of distress was not a matter within the submission. Upon this state of the pleadings, arising on the second avowry and cognizance, the rejoinder must be given up, as being a departure from the plea in bar; and the question of law must be taken to stand, as if there had been a general demurrer by the defendant to that plea in bar. In that view of the case, the facts admitted on the record would be, that Pascoe the younger had originally demised to the plaintiffs the premises in question, at the rent of 36*l.* per annum; but that, upon such demise, he had parted with the whole of his estate and interest, and left himself no reversion; and that a distress had been put in for one year's rent due under such demise, which the plaintiffs had replevied, and the action of replevin had been removed into the Court of King's Bench, and was still pending. It would also appear upon the record, that disputes and differences had arisen, and were subsisting between the parties as to the distress and action at law, and other matters relative to the said tenement, particularly as to the amount of the yearly rent which should be paid for the said estate, and that the parties agreed to refer "as well the matters aforesaid, as all other matters in difference between them," to the award of Mr. Julian. The question, therefore, becomes this, whether under such submission the arbitrator had authority to give a power to distrain for the rent newly fixed by him, which power of distraining the

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landlord did not possess as to the rent originally created by the demise. And we think the arbitrator's authority to give this power ought either to appear by the express words of *the submission, or that it should be brought within the general words of the submission, by a distinct averment on the record, that the question as to the power of distress was one of the matters in difference between the parties to the submission. There is scarcely any conceivable addition to the landlord's powers, which the arbitrator might not have given, unless he is held to be restrained by those two considerations: a power to enter for nonpayment of rent or nonperformance of covenants might be given by the same authority as a power to distrain.

Upon the single ground, therefore, that we do not see that the arbitrator had any authority to give the power of distress for the rent newly fixed by him, and which in all other respects came in the place of the former rent reserved by the demise, we think the second avowry and cognizance cannot be supported, and that there must be judgment on that also for the plaintiffs.

Judgment for the plaintiffs.



1837.
June 9.
 [915]

BAYLEY v. HOMAN.

(3 Bing. N. C. 915—922; S. C. 5 Scott, 94; 3 Hodges, 184; 6 L. J. (N. S.) C. P. 309.)

To covenant for neglecting to repair, plea, that after covenant broken an agreement was entered into between plaintiff and defendant, that—in consideration that defendant at the request of plaintiff had become tenant of the premises from year to year, at a certain rent, and had at the request of plaintiff promised to repair the premises before the 12th of April then next—plaintiff would give time till the 12th of April for such reparation, without bringing an action; and in case the premises should be repaired by the 12th of April would relinquish all claim in respect of the breach of covenant; with an averment, that notwithstanding defendant was ready and willing to perform the agreement, plaintiff commenced his action before the 12th of April: Held ill, on motion in arrest of judgment.

COVENANT by assignee of the reversion against the assignee of a term in a messuage.

Breach, that the defendant did not, nor would, after the said assignment, and during the continuance of the said demise, and

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whilst he continued such assignee, at his own costs and charges, or otherwise, from time to time, and at all times during the said term, well and sufficiently repair the said messuage or tenement and premises; and did not, nor would at the end and expiration of the said term, peaceably and quietly leave, surrender, and yield up unto the plaintiff, entitled to the reversion and inheritance of and in the said demised premises, the said demised premises, and all improvements therein or thereon, so well and sufficiently repaired; but during the continuance of the said demise, and whilst he was such assignee, to wit, on the 1st of January, 1835, and from thence for a long space of time, to wit, from thence until the end and expiration of the said term, suffered and permitted the said messuage or tenement and premises, to be and continue, and the same were for and during all that time, ruinous, prostrate, fallen down, dilapidated, and in great decay for want of well and sufficiently repairing the same: and the defendant, at the end and expiration of the said term, left, surrendered, and yielded up the said premises unto the plaintiff, and divers improvements thereon so badly and insufficiently repaired.

Plea, That after the covenant for repairing and leaving in repair had been broken by the defendant, and after the expiration of the said term in the declaration mentioned, and long before the commencement of this suit, to wit, on the 25th of December, 1835, the said messuage or tenement and premises being so ruinous, prostrate, fallen down, dilapidated, and in decay, as in the declaration in that behalf was alleged, it was agreed by and between the plaintiff and the defendant, and the plaintiff also then promised the defendant, that—in consideration that the defendant, at the request of the plaintiff, had become and then was the occupier of the said messuage or tenement and premises, with the appurtenances, and held the same as tenant thereof from year to year, at and under a certain yearly rent, therefore payable by the defendant to the plaintiff, and had also, at the like request of the plaintiff, promised the plaintiff well and sufficiently to repair and amend the said messuage or tenement and premises, in the manner required by the said indenture in the declaration mentioned, on or before

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the 12th of April, 1836,—he the plaintiff would forbear and give time to the defendant until the said 12th of April, 1836, for the due reparation and amendment of the said messuage or tenement and premises, in the manner required by the said indenture as aforesaid, without in the mean time commencing or prosecuting any action or suit against the defendant, in respect of the said breaches of covenant in the declaration mentioned, or any part thereof; and that in case the said messuage or tenement and premises, should be so well and sufficiently repaired and amended as aforesaid, on the said 12th of April, 1836, he the plaintiff would then relinquish and forego all claim and demand whatsoever of him the plaintiff, upon or against the defendant in respect of the said breaches of covenant or any part thereof: and although from the time of the *making the said agreement, and thenceforth until and at the time of the commencement of this suit, the defendant, who, during all that time, remained and continued tenant of the said messuage or tenement and premises to the plaintiff as aforesaid, was always ready and willing to perform and fulfil the said agreement on his part, and well and sufficiently to repair and amend the said messuage or tenement and premises in the manner required by the said indenture, so that the same should be so well and sufficiently repaired and amended by and on the said 12th of April, 1836, whereof the plaintiff had notice, yet the plaintiff, not regarding his said agreement and promise, wrongfully commenced his suit in that behalf against the defendant before the said 12th of April, 1836, to wit, on the 6th of April, 1836: and that, the defendant was ready to verify.

After a verdict for the defendant, *Stephen*, Serjt., in Easter Term, obtained a rule *nisi* to enter judgment *non obstante reredicto*, on the ground that if the plea were a plea of accord and satisfaction, it was ill for not shewing the satisfaction executed; if it disclosed an agreement not to sue, such agreement would at most furnish ground for a cross action, but, not being under seal, could be no bar to an action of covenant.

Talfourd, Serjt. and *Gurney*, who shewed cause, contended that this was not a plea of accord, but of the substitution of a

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new contract, by which the plaintiff had agreed to suspend the remedy for the recovery of his claim; and they relied on *Good v. Cheesman* (1), where a debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor), to accept payment by his covenanting to pay two-thirds of his annual income to a trustee of their nomination: the creditors never nominated *a trustee, the agreement was not acted upon, and one of the creditors brought an action against the debtor for his demand; but the debtor appeared to have been always willing to perform his part of the engagement; and it was held, that the agreement, though not properly an accord and satisfaction, was still a good defence on the general issue, as it constituted a valid new contract between the creditors and the debtor, capable of being immediately enforced, the consideration for which to each creditor was the forbearance of the rest, and there appeared to be no failure of performance on the part of the debtor. In Comyn's Digest, Accord, B. 4, it is laid down, that an accord with mutual promises to perform, is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: *Case v. Barber* (2): and in *Alden v. Blague* (3), that the accord need not be under seal. In *Cartwright v. Cooke* (4), the defendant and John Cooke, brothers, were principal and surety in an annuity bond: by an agreement afterwards executed between them and a third brother, for the settlement of their affairs, and the determination of their mutual claims, an apportionment of property and of debts was made among the three, and the annuity bond was declared to be John Cooke's (the surety's) debt: it was held, that that agreement (whether subsequently acted upon or not) was a binding accord between the defendant and John Cooke, and that John Cooke's administrator having been obliged to pay arrears of the annuity, could not recover them from the defendant. *Stracy v. The Bank of England* (5) also decided that by agreement a party may suspend his right to sue, and that such suspension may be insisted on till the condition on which it is to determine has been fulfilled.

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(1) 36 R. B. 374 (2 B. & Ad. 328).

(4) 37 R. B. 534 (3 B. & Ad. 701).

(2) Sir T. Jones, 158.

(5) 6 Bing. 754.

(3) Cro. Jac. 99.

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Stephen, in support of the rule :

The agreement here, not being under seal, is no bar to an action on the defendant's covenant. And the defendant being already bound by his covenant to repair generally, his undertaking to repair by a certain day is no consideration for the plaintiff's agreement to relinquish his action of covenant. In *Adams v. Tapling* (1), in covenant, on a breach that the house was not in repair, a plea, that the plaintiff agreed that the defendant should employ a person four days in and about repairing the house, in satisfaction, was held bad ; for the defendant was obliged to do the repairs by the original covenant.

And though accord need not be under seal because it is presumed to be followed up by satisfaction, yet it is unavailing, unless the satisfaction be complete. A tender of satisfaction will not suffice : 1 Roll. Abr. 129, Dyer, 356, *Peytoe's case* (2), *Rayne v. Orton* (3), *Allen v. Harris* (4), *Lynn v. Bruce* (5), *James v. David* (6). *Good v. Cheesman* proceeded on the ground that it would be a fraud on the other creditors to depart from the agreement : and the only exceptions to the established rule as to accord and satisfaction, are the cases where, by the agreement, a fund is provided for creditors, and a cause of action is given at the time of the plea.

Cur. adv. vult.

TINDAL, Ch. J. :

The motion which has been made by the plaintiff for judgment *non obstante veredicto*, raises the question whether the plea is a legal bar to the action. The plea alleges, that after the covenant for repairing and leaving in repair had been broken by the defendant, and damages for such breach had been incurred, an agreement was entered into between the *defendant and the plaintiff, that—in consideration that the defendant at the request of the plaintiff had become tenant of the premises from year to year under a certain rent, and had also, at the like request of the plaintiff, promised the plaintiff to repair the demised premises before the 12th of April then next, he, the plaintiff, would

(1) 4 Mod. 88.

(2) 9 Co. Rep. 79 b.

(3) Cro. Eliz. 305.

(4) 1 Ld. Ray. 122.

(5) 3 R. R. 381 (2 H. Bl. 317).

(6) 5 T. R. 141.

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forbear and give time to the defendant, until the said 12th of April, for the reparation, without bringing an action in the meantime; and that in case the premises should be well and sufficiently repaired on the said 12th of April, then, that he, the plaintiff, would relinquish all claim and demand in respect of the said breaches of covenant. If the defendant had been able to aver in the plea that the premises had been well and sufficiently repaired before the 12th of April, and the action had not been commenced until after that day, there would have been no doubt but that the plea would have been good as a plea of accord executed and satisfaction. But the plea, as it stands, stating it the most favourably for the defendant, is the plea of an accord which is executory only, and not executed.

It appears by a long train of authorities, commencing with that in *Dyer*, 356, that a plea of accord, to be a good plea, must shew an accord which is not executory at a future day, but which ought to be executed, and has been executed, before the action brought. The same law is laid down in *Roll. Abr.* 129, "accord" pl. 11, 12, 13. Again, in *Peytoe's* case, 9 Rep. 79, where it is broadly stated by the Court that in an accord, if the thing is to be performed at a day to come, an averment of tender and refusal is not sufficient, without actual satisfaction and acceptance. In *Allen v. Harris* (1) the Court say, "the books are so numerous that an accord ought to be executed, that it is now impossible to *overthrow all the books, but if it had been a new point, it might have been worthy of consideration." In the next case in order of time, *Lynn v. Bruce* (2), the same principle is upheld by EYRE, Ch. J. and the Court of Common Pleas; and in *James v. David* (3), by Lord KENYON and the Court of King's Bench. And we think this current of authority is too strong to be met by the doubts expressed by the Court in *Case v. Barber* (4), "that though in former times the pleading upon accord without execution in the whole, is not good according to *Peytoe's* case, yet now, the law being taken that mutual actions lye on such agreements, such plea shall be allowed;"

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(1) 1 *Id.* Ray. 122.

(2) 3 R. R. 381 (2 H. Bl. 317).

(3) 5 T. B. 141.

(4) Sir T. Jones, 158; Sir T. Ray. 452.

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independently of the circumstance that the plea of accord in that case was not held to be good for want of consideration for the defendant's promise. But as to the case of *Good v. Cheesman* (1), in which evidence of an accord, though not executed, was held to be a good answer to the action, it may be considered as standing upon its own peculiar ground; the agreement in that case amounting to a valid new contract between the other creditors and the debtor, capable of being immediately enforced: we think, therefore, if this plea amounted to a plea of an accord executory made upon mutual promises, it must, upon the authorities above referred to, be held to be bad.

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But the plea appears to be open to another objection, namely, that there is no good consideration laid either for the defendant's promise to the plaintiff to repair the premises before the 12th of April, or for the plaintiff's promise to the defendant to forbear to sue until that day. The defendant was liable to damages under the covenant, immediately, for not repairing; and therefore the promise by him to repair before the 12th *of April, can be no consideration for the plaintiff's promise to forbear. And the defendant's promise to repair by the 12th of April, is not made until after the new tenancy is actually contracted, and therefore such tenancy is no consideration for his subsequent promise.

Upon this ground therefore, independently of the former, we think the plea bad; for no action could be supported either against the plaintiff or the defendant, upon the substituted contract stated by way of accord.

Judgment for plaintiff, non obstante veredicto.

(1) 36 R. R. 574 (2 B. & Ad. 328).

STOWELL v. ROBINSON.

(3 Bing. N. C. 928—938; S. C. 5 Scott, 196; 3 Hodges, 197; 6 L. J. (N. S.) C. P. 326; 1 Jur. 8.)

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June 10.
[928]

1. The day for the completion of the purchase of an interest in land inserted in a written contract, cannot be waived by oral agreement, and another day be substituted in its place (1).

2. The failure to procure from the superior lessor, a licence to assign, or to register previous assignments before the agreement for sale is not a breach of the agreement, i.e. does not prove that the vendor had not then a title.

THE first count of the declaration stated that the defendant was possessed of a public house in Middlesex, called the "Newcastle upon Tyne," for the residue of a term; that, by an agreement between the plaintiff and the defendant, the defendant agreed to sell the lease of the said public house to the plaintiff, and to deliver possession by the 3rd of May; that upon the making the agreement, the plaintiff paid a deposit of 50*l.*; and the defendant undertook that he then had lawful right and title to assign over the said lease to the plaintiff. The declaration then stated that the defendant had not lawful right and title, at the time of making the agreement, to assign over the lease to the plaintiff, whereby he was prevented from performing the agreement on his part. There was also a count for money paid, money had and received, interest, and on an account stated.

The defendant pleaded, first, *non assumpsit*. Secondly, to the first count, that defendant had lawful right and title to sell and assign over the lease as in the agreement mentioned. Thirdly, to the first count, that neither plaintiff nor defendant were ready by the day in the agreement mentioned for completing the purchase; that they thereupon agreed to postpone the performance of it for a reasonable time, and that the plaintiff should accept an assignment of the lease, if the defendant made out *a title within such reasonable time; that within such reasonable time the defendant made it appear to the plaintiff that he had such title; but the plaintiff refused to perform the agreement,

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(1) Applied to a written contract for sale of goods for value exceeding 10*l.*, in *Hickman v. Haynes* (1875) L. R. 10 C. P. 598, 44 L. J. C. P. 358. As to the application of the

case according to the rules of equity, see *Howe v. Smith* (1884) 27 Ch. Div. 89, 103, 53 L. J. Ch. 1055, 1062, per FRY, L. J.—R. C.

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and prevented its completion; and that the promise mentioned in the declaration was oral only. Fourthly, to the first count, that the lease to be sold was an indenture of lease between Sir Richard Sutton and one Preston for thirty-one years, which lease had been, by various mesne assignments, conveyed to the defendant: that this lease contained a covenant on the part of Preston, not to assign without the consent in writing of Sir R. Sutton: that Sir R. Sutton gave his consent in writing to the assignment by Preston to the defendant: the plea then stated, that before and at the time of the agreement in the first count mentioned, the defendant had full title to assign, except that he had not procured Sir R. Sutton's licence so to do, of which the plaintiff had notice before the 3rd of May mentioned in the agreement; that the defendant could have procured a licence from Sir R. Sutton, but that the plaintiff undertook to procure the licence himself, and discharged the defendant from doing so, unless the plaintiff gave him notice of his application to Sir R. Sutton being unsuccessful; that by reason of this, the defendant forbore to apply to Sir R. Sutton until the day mentioned in the agreement had passed, and that in the mean time he received no notice from the plaintiff of his inability to procure the licence: that the plaintiff did not use due diligence in procuring the licence from Sir R. Sutton; and after he had given such notice, discharged the defendant from procuring it, which he otherwise could and would have done; whereupon the plaintiff of his own wrong procured the breach of the promise in the first count mentioned. Fifthly, to the first count, as far as it related to the 50*l.* deposit, a waiver by the plaintiff, of the time for completing the agreement, and *that he prevented the completion of the agreement by refusing to perform his part of it.

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The plaintiff joined issue on the first and second pleas; and to the third, fourth, and fifth, replied *de injuriâ*.

At the trial, it appeared that the plaintiff had paid 50*l.* as a deposit, upon entering into the agreement set forth in the declaration, which agreement was in writing, and bore date the 19th of April, 1836. The defendant thereby agreed that he, and all (if any other) necessary parties would assign and set

over the lease of the premises, together with the possession and good-will of the same, and would give the plaintiff quiet possession of them on or before the 3rd of May, 1836.

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The defendant had no power to assign the lease without the consent of the lessor : at the time of making the agreement, the defendant had not obtained any such consent : and assignments prior to the assignment to the defendant, and also that to the defendant, had not been registered.

It further appeared that neither of the parties were ready to carry the contract into effect on the 3rd of May : objections had been taken to the title, which were then in a course of being removed ; the brokers had not completed their valuation ; and on the 3rd, 4th, and 5th of May the agent of the plaintiff was himself endeavouring to procure the proper consent from the ground landlord for the assignment of the lease ; but on the 6th, being informed by the ground landlord's agent that a bond, which the plaintiff objected to give, would certainly be insisted on, he wrote to the defendant to say that he considered the contract at an end, and demanded the return of the deposit, which being withheld, this action was commenced.

Within a few days after the receipt of that letter the plaintiff's objections would have been removed.

For the defendant it was contended that the omission to be furnished with a licence from the ground landlord at the time of the agreement was no breach of the agreement ; and that the day appointed for delivering possession was not of the essence of the contract : but that if there had been a breach of the agreement in either respect, the plaintiff had waived it by endeavouring himself to procure the licence after the 3rd of May.

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A verdict having been found for the defendant,

Erle obtained a rule *nisi* to enter a verdict for the plaintiff on the count for money had and received, or for a new trial, on the ground that, as the defendant could not convey without a licence, he ought to have obtained it before executing the agreement, as well as to have perfected his title, by registering all the assignments of the premises : that the day for delivering possession, was of the essence of the contract, as the plaintiff

STOWELL would be obliged to have his money ready for payment, and
 ROBINSON. would lose all return for it as long as he was kept out of possession: that his endeavouring, in ease of the defendant, himself to procure the licence, was no waiver of either objection: and that without infringing the Statute of Frauds, a different day could not be substituted by oral agreement for the day in the written agreement: *Goss v. Lord Nugent* (1).

[After argument the COURT took time for consideration.]

[934] TINDAL, Ch. J. :

The plaintiff declared in his first count upon a special agreement for the sale by the defendant to the plaintiff of the good-will of a public house, assigning as a breach of the agreement that the defendant, at the time of the agreement, had no lawful title to assign his lease; and he declared in his second
 [*935] and last counts respectively for money had and received *to his use, and upon an account stated between him and the defendant. The jury found a verdict for the defendant; and a rule was obtained by the plaintiff, calling on the defendant to shew cause why the verdict should not be set aside, and a verdict be entered for the plaintiff on the count for money had and received, or why there should not be a new trial.

With respect to the first count, if the matter had rested on that count alone, we should not have thought it a case in which the verdict ought to be disturbed; for we think the breach which has been assigned in that count, and which has been traversed by one of the pleas, was not proved by the evidence given at the trial of the cause. The breach assigned is, that the defendant, at the time of making his agreement, had not lawful right or title to sell or assign over the lease to the plaintiff. But there was no proof of any invalidity or defect in the defendant's right or title to convey at the time of the agreement; the only objection taken was, that he had not, at that time, procured a licence from the landlord to assign the lease to the defendant, and that the assignments prior to that to himself, and also his own assignment, had not been then

(1) 39 R. R. 392 (5 B. & Ad. 58).

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registered. But neither of these objections go to impeach the validity of the defendant's title at the time of the agreement; for the licence to assign cannot of necessity be obtained before the agreement is made with the intended purchaser, until which time the name of the intended assignee is not known; and as to the want of registration of some of the previous assignments, and also of that made to the defendant himself, as there was no other subsequent purchaser who had registered the assignment to himself, the objection was capable of being cured at any time before the completion of the purchase; and we think the terms of the agreement pointed only at incurable defects in the title, and not to such imperfections *as are capable of being removed, and usually are removed after the agreement is made, and whilst the title is under investigation. The right of the plaintiff, therefore, to recover a verdict, will turn upon the count for money had and received; under which count the plaintiff contends he had a right to recover the sum of 50*l.*, which was advanced by him as a deposit on signing the agreement, upon the ground that the defendant had not completed the conveyance, and given the possession of the premises to the plaintiff, on or before the 3rd of May, according to the stipulations of the agreement. The defendant, on the other hand, contends, that the day specified in the agreement was not an essential and material part of the contract; and that both the plaintiff and defendant in the completion of the contract acted upon the footing that the precise day was not material, and by their course of dealing, after that day with each other must be taken to have substituted a performance within a reasonable time after the 3rd of May, in the place of a performance on that precise day; and the jury were of that opinion upon the point being left for their determination: and the question which was reserved for our consideration, and which has been argued before us, is, whether such a finding is consistent with the rules of law.

It may be taken in this case to have been proved at the trial, that the parties were neither of them ready to carry the contract into effect on the 3rd of May, not only on account of the objections that were taken to the title, and which were then

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in a course of being removed, but also because at that time the brokers had not completed their valuation; and it may further be taken, that both upon the 3rd, 4th, and 5th of May, the agent of the plaintiff, the buyer (who appeared to have taken that part of the business upon himself), was endeavouring to procure the proper licence from the ground landlord *for the assignment of the lease; but that on the 6th, being informed by the landlord's agent, that a bond which had been objected to would be required to be given by the purchaser, he writes to the defendant on the same day, that he considers the contract at an end, and demands the return of the deposit. Within a few days after this letter, and within, what appears to us to be, a reasonable time for that purpose, the objections would have been removed. So that the question as was before stated, is this, can the day for the completion of the purchase of an interest in land, inserted in a written contract, be waived by a parol agreement, and another day be substituted in its place, so as to bind the parties? And we are of opinion that it cannot.

This is an agreement for the sale of land, upon which, by the Statute of Frauds, section 4, no action can be brought "unless it is in writing, and signed by the party to be charged therewith, or his agent thereunto lawfully authorised." Now we cannot get over the difficulty which has been pressed upon us, that to allow the substitution of a new stipulation as to the time of completing the contract by reason of a subsequent parol agreement between the parties to that effect, in lieu of a stipulation as to time contained in the written agreement signed by the parties, is virtually and substantially to allow an action to be brought on an agreement relating to the sale of land partly in writing signed by the parties, and partly not in writing, but by parol only, and amounts to a contravention of the Statute of Frauds. Such was the opinion expressed by Lord Chancellor HARDWICKE in *Partricke v. Powlett* (1): of Sir W. GRANT, Master of the Rolls, in *Price v. Dyer* (2). And we think the reasoning upon which the judgment of the Court of *King's Bench proceeds in *Goss v. Lord Nugent* (3), goes directly

(1) 2 Atk. 383.

(3) 39 R. R. 392 (5 B. & Ad. 58).

(2) 11 R. R. 102 (17 Ves. 356).

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to the point, that the evidence now under discussion is inadmissible.

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Upon the ground, therefore, that the verdict of the jury in favour of the defendant is founded on that evidence, we think there must be a new trial; to which however it will be useless to have recourse, unless the defendant can remove the difficulty by producing evidence in writing as to the enlargement of the time, or unless for the purpose of putting this question upon the record.

Rule absolute.

CAPPER AND OTHERS v. FORSTER (1).

(3 Bing. N. C. 938—950; S. C. 5 Scott, 129; 3 Hodges, 177; 6 L. J. (N. S.) C. P. 332; 1 Jur. 41.)

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Where a ship is chartered to bring home a cargo of enumerated articles at rates of freight specified for each, which articles are not provided by the charterer, the freight must be paid upon average quantities of all the articles, whether the ship return empty or laden with a cargo of articles different from those enumerated.

THE declaration stated, that on the 30th of December, 1834, by a certain memorandum for charter then made between the plaintiffs therein described as owners of the ship *Flora*, of the measurement of 150 tons or thereabouts, then lying in the river Thames, of the one part, and the defendant of the other part, it was mutually agreed between the plaintiffs and the defendant, that the said ship should, with all convenient speed, receive and take on board whatever lawful goods and merchandise the charterer might cause to be sent alongside, and therewith proceed to Rio Nunez and discharge the same at the factory of the charterer's agent; and having so discharged her outward cargo, should reload a full and complete cargo of lawful merchandise, which the said merchant bound himself to ship, not exceeding what she could reasonably stow and carry over *and above her tackle, apparel, provisions, and furniture; and being so loaded, should therewith proceed to London and discharge at one of the regular docks, at the option of the charterer, or so near

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(2) Distinguished in *Southampton* 56 (affirmed Ex. Ch. 1870, L. R. 6 *Steam Colliery Co. v. Clarke* (1868) Ex. 53, 40 L. J. Ex. 8).—R. C. L. R. 4 Ex. 73, 79, 38 L. J. Ex. 54,

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unto as she might safely get, and deliver the same on being paid freight as follows, in full for the above voyage; viz., for gum, bees' wax, ivory, and palm oil, 4*l.* per ton, at 20 cwt. nett at the King's beam; hides, at 7*l.* per ton of 20 cwt. nett at the King's beam; paddy or rice, 3*l.* per ton nett weight; bullion one per cent.; all or either at the option of the charterer; in full and in lieu of all port charges and pilotage as customary; (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what nature and kind soever during the said voyage always excepted;) one half of the freight to be paid in cash on unloading and right delivery of the cargo, and the remainder by an approved bill at three months then following; thirty-five running days to be allowed to the said merchant (if the ship were not sooner dispatched), for loading at the places of loading on the coast of Africa, and ten days on demurrage over and above the said lay days, at 4*l.* per day: should the quantity of paddy exceed 80 tons, 20*s.* per ton extra freight was to be paid on the surplus; and the quantity of hides was not to exceed 50 tons. The charterer was to have the liberty of shipping whatever goods he might send outwards, free of freight, but paying the difference of the ship's expenses in taking in cargo and going in ballast: and the vessel was to call at St. Mary's on her homeward voyage for clearance for England, the charterer paying her port charges and her pilotage in and out of the river Gambia; should paddy or rice be shipped, the charterer was to find dunnage; and should the vessel not be full at Rio Nunez, the charterer was to have the liberty of filling her up at St. Mary's. *The vessel was to be dispatched from London ten days after entering out at the custom-house; and the penalty for non-performance of the agreement was 700*l.*

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The breach assigned was that the defendant did not, within the said lay days in the memorandum of charter mentioned, or at any other time before or since, load such full and complete cargo at Rio Nunez aforesaid, but on the contrary thereof loaded at Rio Nunez a small part only of a full and complete cargo, to wit, one seventh part only of such full and complete cargo as the said ship or vessel could have reasonably stowed and carried over

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and above the tackle, apparel, provisions, and furniture; and then wholly refused to load at Rio Nunez any further or greater cargo therein: That after the defendant had loaded on board the said ship or vessel at Rio Nunez such cargo as aforesaid, to wit, on the 14th of March, 1835, the plaintiffs sailed and proceeded with the said ship or vessel, by the order and direction of the defendant, to St. Mary's, in the said memorandum of charter mentioned; and afterwards, to wit, on, &c., arrived with the said ship or vessel at St. Mary's aforesaid, and were there ready and willing to suffer and allow the defendant to fill up and complete a full and complete cargo for the said ship of all such lawful merchandise as in the memorandum of charter was mentioned, according to the terms of the said memorandum, and then requested him so to do; nevertheless the defendant further disregarding his said promise, did not, nor would, when he was so requested as aforesaid, or within the said lay days in the memorandum of charter mentioned, or at any other time before or since, fill up at St. Mary's such full and complete cargo of lawful merchandise, but then and at all times wholly neglected and refused so to do; and then filled up a small part only of the said ship or vessel with such lawful merchandise as she could reasonably have stowed and carried *over and above her tackle, apparel, provisions, and furniture; and then wrongfully and improperly filled up the said ship or vessel at St. Mary's aforesaid with a certain large quantity of merchandise, other than according to the true intent and meaning of the said memorandum of charter, to wit, with timber and wood: by means of which several premises the plaintiffs not only lost and were deprived of a large sum of money, to wit, the sum of 600*l.*, which they might and would have made by having such full and complete cargo of lawful merchandise loaded on board the said ship or vessel at Rio Nunez and St. Mary's aforesaid, according to the terms of the said memorandum of charter, but also, by means of the loading on board the said ship or vessel at St. Mary's aforesaid such cargo of timber and wood, the said ship or vessel was then greatly broken, damaged, injured, and shattered, and rendered of less value to the plaintiffs than she otherwise would have been. And the plaintiffs further said, that after the making

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of the memorandum, to wit, on, &c., a large sum of money, to wit, the sum of 1,000*l.*, became and was due and payable from the defendant to the plaintiffs for and in respect of the freight of goods, wares, and merchandises, shipped and loaded on board of the said ship or vessel according to the true intent and meaning of the said memorandum, and carried and conveyed therein in the said voyage in the said memorandum mentioned; of which said premises the defendant then had notice, and was requested by the plaintiffs to pay them the same; yet the defendant did not pay to the plaintiffs the said last-mentioned sum.

There was a count for freight payable for the conveyance of goods; and a count on an account stated.

To the two last counts the defendant pleaded *non assumpsit*, on which issue was joined.

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And as to so much of the breach of the said promise, in the first count of the declaration mentioned, as related *to the defendant not loading a full and complete cargo at Rio Nunez, the defendant pleaded that he could not load such full and complete cargo at Rio Nunez as was mentioned in the said memorandum of charter; and of that, he put himself upon the country, &c. Then, as to so much of the breach of the said promise, in the said first count mentioned, as related to the defendant not filling up at St. Mary's a full and complete cargo of lawful merchandise as aforesaid, the defendant pleaded that he did, within the said lay days in the memorandum of charter mentioned, fill up at St. Mary's, in the memorandum of charter and declaration mentioned, a full and complete cargo of lawful merchandise, not exceeding what the said ship or vessel could reasonably stow and carry over and above her tackle, apparel, provisions, and furniture, according to the true intent and meaning of the said memorandum of charter, and did not fill up the said ship or vessel at St. Mary's aforesaid with any merchandise whatsoever, other than according to the true intent and meaning of the said memorandum of charter; and of that, the defendant put himself upon the country, &c. As to so much of the breach of the said promise, in the first count mentioned, as related to the nonpayment of 538*l.* 17*s.* 11*d.*, parcel of the sum of 1,000*l.*, in the first count stated to be due and payable in

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respect of freight, the defendant pleaded, that after the said sum of 538*l.* 17*s.* 11*d.* became due and payable from the defendant to the plaintiffs in respect of freight, as in the declaration was stated, and before the commencement of this suit, to wit, on, &c., an account was had and stated by and between the plaintiffs and the defendant of and concerning the said sum of 538*l.* 17*s.* 11*d.*, and upon that accounting the plaintiffs were found to be in arrear, and indebted to the defendant in the sum of 98*l.* 17*s.* 6*d.*, which was then upon that account allowed to the defendant in account against the said sum of 538*l.* 17*s.* 11*d.*; and the residue of the said last-mentioned *sum, to wit, the sum of 440*l.* 0*s.* 5*d.* was then paid by the defendant to the plaintiffs, and accepted by them in full satisfaction and discharge of the balance due in respect of the said sum of 538*l.* 17*s.* 11*d.*, after allowing the said set off of 98*l.* 17*s.* 6*d.*, and of all damage in respect of the said breach of promise, so far as related to the said sum of 538*l.* 17*s.* 11*d.*; and that, the defendant was ready to verify.

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The plaintiffs, after joining issue on the first and second pleas to the first count, replied to the third, that they did not accept the said sum of 440*l.* 0*s.* 5*d.* in full satisfaction and discharge of the balance due in respect of the said sum of 538*l.* 17*s.* 11*d.*, and of the said damages in respect of the breach of promise as far as related to the said sum of 538*l.* 17*s.* 11*d.*, in manner and form as the defendant had above in his third plea in that behalf alleged; and that, the plaintiffs prayed might be enquired of by the country, &c.

At the trial before Tindal, Ch. J., it appeared that the *Flora*, being hired and despatched from London, according to the memorandum of charter above set forth, with 886 packages of merchandise,

On her arrival at Rio Nunez, the charterer's agent informed the captain that another vessel had taken the goods provided for the *Flora*; that it was impossible to load the *Flora* for some time, and that the captain had better return to St. Mary's.

The captain thereupon unloaded all the packages but thirty, which he afterwards delivered at St. Mary's, pursuant to the directions of the charterer's agent; he took on board 50 pipes of

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brandy, which he also delivered at St. Mary's under the same directions, one box of gold dust, and 158 quarters of paddy, for a homeward cargo, being about one-seventh of a full cargo.

[*944] At St. Mary's, the charterer put on board 205 quarters *of paddy, and 600 hides, and filled up the rest of the ship with 84 loads of teak wood, the staple commodity of the place, at the freight of 4*l.* a load, under a protest from the captain, that it was not to affect the claim of the owners.

The defendant paid into Court 598*l.* 10*s.* 6*d.* The plaintiffs contended, that they were entitled to the freight which would have been earned if there had been a full cargo of the articles enumerated in the charter-party.

The defendant contended, he had a right to put on board a cargo consisting of any one of the enumerated articles: his witnesses proved that a cargo of palm oil would not have produced 538*l.* freight; that it was usual in this trade to insert in the charter the articles here specified, and to add, "and other goods in proportion."

There was some contest about the capacity of the vessel, but the jury found that a full cargo of the various articles enumerated would have produced 668*l.* freight; a cargo of palm oil only 452*l.* They also found, as to the issue joined on the first breach assigned, that the defendant might have loaded a full and complete cargo at Rio Nunez:

Upon the second, that the defendant did not fill up at St. Mary's a full and complete cargo of lawful merchandise, according to the true intent of the charter:

And, upon the third, that there was still due to the plaintiffs from the defendant, 74*l.* 1*s.* 6*d.* for freight under the charter.

Pursuant to leave reserved,

[*945] Taddy, Serjt., obtained a rule *nisi* for a new trial, or for a reduction of damages, upon the construction of the charter-party. He contended, first, that the defendant had performed his engagement by putting something, however little, on board at Rio Nunez, and then filling *up at St. Mary's with the staple of the place; and that if this were not a sufficient performance, the breach ought to have been differently assigned:

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Secondly, that if such were not the true construction of the agreement, the damage should have been estimated as if the defendant had brought nothing. In that case, as he would have been entitled to load with palm oil only, all or either of the enumerated articles being at the option of the charterer, the plaintiffs could have claimed no more than 45*l.* freight.

Wilde and Talfourd, Serjts., with *R. V. Richards*, shewed cause :

The defendant having joined issue on the breach as assigned, cannot now object to its sufficiency.

It is manifest from the provisions of the charter that the principal destination of the ship was Rio Nunez ; it is only in ease of the defendant that he is allowed to fill up at St. Mary's ; but it was never intended that he should put on board there the principal part of a cargo consisting of articles less advantageous to the owner than the articles enumerated for Rio Nunez.

The defendant, therefore, having failed to put on board at the principal place a cargo of the articles enumerated, the damages must be estimated on the same principle as if the ship had come home empty : in such a case it is laid down in *Abbott on Shipping*, part 3, chap. 7, on payment of freight, that if a ship go to a port for a cargo of enumerated articles which are not found, the freight must be paid upon average quantities of all the articles according to the custom of the port. That principle was acted on in *Wallace v. Small* (1), and *Thomas v. Clarke* (2). In *Moorsom v. Page* (3), the ship *was to take copper, tallow, and hides, or other goods ; she had a full cargo of tallow and hides, but no copper ; and Lord ELLENBOROUGH held, that the charter was satisfied, the charterer having the option of taking other articles besides the copper. Under the present charter the defendant has no such option.

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Taddy and Wightman, in support of the rule :

But the defendant has the option of taking any of the enumerated articles ; and if he had taken a cargo of palm oil

(1) Cited in *Irring v. Clegg*, 41 R. R. 563 (1 Bing. N. C. 53).

(2) 20 R. R. 714 (2 Stark. 450).

(3) 15 R. R. 731 (4 Camp. 103).

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at Rio Nunez, the freight would only have amounted to 452*l.*, which is less than the sum paid into Court: palm oil is an article for which a middle freight is to be paid, and therefore affords a fair basis of calculation between the plaintiffs and the defendant: if therefore the defendant was not entitled to fill up with timber at St. Mary's in the proportion in which he did fill up, at all events the freight of the timber ought not to exceed that of a cargo of palm oil. *Thomas v. Clarke* is only a *Nisi Prius* decision, and it does not appear whether the defendant had any option among the enumerated articles; but *Moorsom v. Page* is in favour of the defendant.

Cur. adv. vult.

TINDAL, Ch. J.:

This was an action of assumpsit, brought on a memorandum for charter made between the plaintiffs, as owners of the ship *Flora*, of the one part, and the defendant of the other part; and upon the issues joined on three breaches assigned in the declaration, the jury found, as to the first, that the defendant might have loaded a full and complete cargo at Rio Nunez; upon the second, that the defendant did not fill up at St. Mary's a full and complete cargo of lawful merchandise, according to the true intent and meaning of the said charter; and upon the last, that *there is still due to the plaintiffs from the defendant the sum of 74*l.* 1*s.* 6*d.*, for freight under the charter. There were other issues joined upon the pleadings, to which it is unnecessary to advert, as the principal question before us turns upon the principle upon which the amount of the damages ought to be calculated, reference being had to the proper construction of the charter-party.

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The defendant has brought the case before us upon a rule calling either for a new trial, or for the reduction of the damages given by the present verdict. With respect to the new trial, the defendant contends, that as to the two first issues, the verdict ought to have been found in his favour. The breaches might, possibly, have been more aptly and precisely assigned with reference to the terms of the charter; but as the defendant has thought proper to take issue, and go to trial upon them as framed in the declaration, we cannot think them so deficient in

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form, or so ill adapted to the case, as to be objectionable on that ground, in this stage of the proceedings. And upon the evidence given at the trial, we see no ground to disturb the verdict.

As we understand the charter, it contemplates a voyage to Rio Nunez, at which place it was intended, both by the ship-owners and the merchant, that the outward cargo should be discharged, and the homeward cargo put on board—such homeward cargo being intended to consist of the enumerated articles, or of some of them; with liberty, however, of filling up the vessel at St. Mary's; that is, of supplying at the latter place any deficiency of the contemplated cargo which they might be unable to procure at Rio Nunez. That Rio Nunez was her place of destination appears manifest, from the provision, that "she was to discharge her outward cargo at the factory of the merchant's agent there; and, having so discharged her outward cargo, was to reload a full *and complete cargo of lawful merchandise, which the merchant binds himself to ship." This is the direct obligation into which the merchant enters; the filling up at St. Mary's is only a liberty given to him in his own ease, and for his relief, in case he should be unable to comply with his direct obligation. And we think this provision in the charter points so specifically to Rio Nunez, as the port of discharge and reloading of the homeward cargo, that we cannot give to the mention of "ports of loading on the coast of Africa," or "the liberty of filling her up at St. Mary's," the force of altering or controlling the primary intention of the charter. And, upon the evidence before the jury of what had taken place at Rio Nunez, just previous to the arrival of the *F'lora*, we cannot think them wrong in finding the first issue for the plaintiffs: they probably, and not unreasonably, thought that the cargo, which had been recently forwarded by the defendant's agents by another ship, the *James*, might have been sent by the *F'lora*, if those agents had been inclined so to send it.

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And, as to the second issue; upon the construction we have already put upon the charter-party, we think the jury right in finding, that the loading nearly a complete cargo of lumber at St. Mary's, although it was the staple commodity of that place, was not a "filling up with lawful merchandise," according to the

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intention of the parties ; and that the verdict upon that issue also, ought not to be disturbed.

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The real question, however, between the shipowners and the merchant arises upon the amount of damages which the jury have found by their verdict : which damages, whether they be considered as the measure of the injury sustained by the plaintiffs upon the two first breaches, or as the sum due for the freight of the cargo actually brought home, upon the third breach, is immaterial. The plaintiffs on the one hand contend, that *upon the legal construction of the charter, they are entitled to an amount of freight which would have been earned, if the ship had brought home a cargo consisting of average quantities of all the enumerated articles ; the defendant on the other hand contends, that the ship-owners are only entitled to freight for the timber actually brought home, upon a *quantum meruit* ; or to the freight due upon a full cargo of any one of the enumerated articles, at the option of the merchant ; or, at the very utmost, to the freight due upon a full cargo of any one of the articles for which a middle rate of freight is charged,—such for instance as palm oil : under any of which modes of adjustment, the plaintiffs, as it is admitted, are over paid.

Now, if the ship had returned empty, we think the question now raised must be considered as settled. The opinion expressed by the very learned and accurate writer of the law of ships and shipping, referred to in the course of the argument, and the case of *Thomas v. Clarke* (1), the decision of which was not appealed from by any motion to the Court, appears to us to lay down and establish a rule, which is at once just and reasonable, and may fairly be inferred to meet the intentions of the contracting parties. And we can see no real distinction to be made between the application of this rule to the case where the ship returns empty, and where she returns with a cargo of articles, altogether, or in a very large proportion, of a different nature and quality from those enumerated in the charter, and between which cargo brought home and the enumerated articles, there is no common measure whatever. In both cases, the original intention and expectation of the parties at the time the charter was entered

(1) 20 R. R. 714 (2 Stark. 430).

into as to the amount of freight which would become payable for the voyage, must have *been founded upon the assumption, that the ship would bring home a cargo consisting of all or some of the enumerated articles; in both cases, therefore, there exists the same necessity of applying the rule above laid down, which necessity is grounded on the consideration, that unless you adopt this rule, you have no other guide whatever; the liberty, “to fill up with other lawful merchandises,” being understood by us to mean other lawful merchandises, *ejusdem generis*, at least so far as the calculation of the freight is involved in that construction. And as the question of the amount of damages, or the amount of freight, whichever it is to be considered, was left to a special jury of merchants in the city, who have adopted that rule of calculation, with respect to the breach of a mercantile contract, it is sufficient for us to say, we cannot feel ourselves authorised either to reduce such amount, or to direct a new trial.

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Rule discharged.

DELEGAL v. HIGHLEY.

(3 Bing. N. C. 950—963; S. C. 5 Scott, 154; 3 Hodges, 158; 6 L. J. (N. S.) C. P. 337; S. C. at Nisi Prius, 8 Car. & P. 444.)

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1. A plea to an action for a malicious charge before a magistrate, justifying the charge on the ground that the plaintiff had committed the offence imputed to him, is not sufficient unless it allege, that at the time of the charge the defendant had been informed of, or knew the facts on which the charge was made (1).

2. A publication of proceedings in a court of justice cannot be justified if it contain disparaging observations made by any other than one whose duty called upon him to make them.

3. It is no justification of such a publication to plead that the proceedings in question took place, unless it be also alleged that the charges made were true, or that the publication is a true and full account of the proceedings (2).

THE declaration stated that the defendant, on the 24th of October, 1835, falsely and maliciously, and without any

(1) Compare the judgment of the principles in *Panton v. Williams* (1841) 2 Q. B. 169, and *Lister v. Perryman* (1870) L. R. 4 H. L. 521.—R. C.

(2) *Macdougall v. Knight* (1890) 25 Q. B. Div. 1, 59 L. J. Q. B. 517; *Kimber v. Press Association* [1893] 1 Q. B. 65, 62 L. J. Q. B. 152.

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reasonable or probable cause whatsoever, caused and procured one John Henley, to make, before *Henry Winchester, Esq., at the Mansion House, in the city of London (the said Henry Winchester then being mayor of the said city, and one of the justices assigned to keep the peace of our lord the King, within and for the said city, &c.) a certain complaint, charge, and accusation, against the plaintiff, to wit, that the plaintiff then improperly detained two blank bill stamps, having the signature thereon respectively of the said John Henley; and that the plaintiff had fraudulently obtained the said signature of the said John Henley to the said blank bill stamps respectively; and thereupon the defendant then falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the plaintiff to be, and the plaintiff then was thereupon summoned to appear, and did, on such summons, to wit, on, &c. necessarily appear at the said Mansion House, to answer the matters of the said complaint, charge, and accusation; and thereupon, to wit, on, &c., the defendant falsely and maliciously, and without any reasonable or probable cause whatsoever, caused and procured the said John Henley to prosecute and continue the said complaint, charge, and accusation, before the said Henry Winchester, then being mayor, &c., until the said Henry Winchester, then being mayor, &c., to wit, on &c., having heard and considered every thing that was alleged and said touching the said complaint, charge, and accusation, wholly acquitted and discharged the plaintiff therefrom; and then dismissed the said summons.

The second count was for maliciously,—with the intention of injuring the plaintiff in his good name, fame, and credit; of causing it to be believed that he had been taken into custody on a criminal charge, and was guilty of the offence imputed to him, —publishing the following libel of and concerning the plaintiff, and of and concerning the proceedings before the Lord Mayor.

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*“ Police, Mansion House. On Monday, Charles Delegal, Irish provision agent, 39, Clement’s Lane, Lombard Street, was charged before the Lord Mayor with having fraudulently obtained the signature of John Henley, a youth under twenty years of age, to two blank stamped bills. Mr. Flower stated the case to his Lordship, and called John Henley, who said he was induced by

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Delegal to come from Manchester to attend in a shop Delegal was about to open in the New Cut, Lambeth. After he had been a few days in town, he was desired by Delegal to go to his counting-house, in Clement's Lane, Lombard Street, when some papers were given him to copy ; Delegal then placed before him two pieces of paper, which he desired him to write across, which Henley did, thinking Delegal wished it as a specimen of his handwriting ; but when Delegal removed them he then saw the stamps, which had been hidden under some other papers. He had since asked Delegal about them, but received evasive answers. Charles Delegal produced several letters, which the Lord Mayor refused to look at. He then stated that one was only a memorandum, which had been destroyed ; and produced a mutilated portion of it, with the name of the complainant written on it : the other was a bill, which had likewise been destroyed, and he called Russell, who swore that he saw the bill destroyed about a week ago. Mr. Hobler, the chief clerk, observed, that it was exceedingly improper under any circumstances to obtain the signature of the complainant, a mere boy, to bills of exchange. The Lord Mayor said, that as it had been shewn that both the bills had been destroyed, the complainant need be under no further apprehension ; and Delegal was discharged."

The defendant pleaded, secondly, that he caused and procured the said John Henley to make before the Lord Mayor the said complaint, charge, and accusation, against the plaintiff in the first count mentioned, *and caused and procured the plaintiff to be summoned to appear at the said Mansion House, and the said J. Henley to prosecute and continue the charge, complaint, and accusation, upon and with a reasonable and probable cause ; that is to say, because theretofore, to wit, on the 1st of August, 1835, the said J. Henley being the son of a sister of the wife of the plaintiff, who was also a sister of the wife of the defendant, had agreed with the plaintiff to become a shop-boy in a certain shop of the plaintiff ; to wit, in the parish of Lambeth, in the county of Surrey ; he the said J. Henley, being then under the age of twenty years : and afterwards, to wit, on &c., he the said J. Henley so being such shop-boy of the plaintiff, and under the age of twenty years, at the request of the plaintiff, went to his

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counting-house, being in Clement's Lane, Lombard Street, in the city of London, and so being in the said counting-house, the plaintiff then placed before him the said J. Henley two slips of blank paper, and then desired him the said J. Henley to write his name across, without acquainting him with the purpose thereof; and the said J. Henley did, then being such shop-boy and under the age of twenty years, at the request of the plaintiff, write his name across the said slips of blank paper respectively, he the said J. Henley then being ignorant that the said slips of blank paper were stamped, and thinking that the plaintiff wished only to see a specimen of the handwriting of him, J. Henley: that the said slips of blank paper, at the time when the said J. Henley so wrote his name across them, were severally stamped as bills of exchange, with certain stamps of our lord the King, but that J. Henley did not, nor could at the time he so wrote his name, know of or see and observe the said stamps, because they were hidden by certain other papers, when the said slips of paper were so placed before him by the said plaintiff: that afterwards, to *wit, on &c., the said J. Henley requested the plaintiff to inform him what the said slips of paper were, but the plaintiff did not, nor would then, or at any time before the making of the said charge and complaint, comply with the said request of the said J. Henley, or any part thereof: That afterwards, to wit, &c., one Harriet Henley, being the mother of J. Henley, requested the plaintiff to inform her what the said slips of paper were; but the plaintiff did not, nor would then, or at any time before the making of the said charge and complaint, comply with the said request of the said Harriet Henley, or any part thereof; wherefore the defendant had reasonable and probable cause to believe, and did believe, that the plaintiff, before, and at the time of the making of the said charge and complaint, improperly detained the said two blank bill stamps, having the signature thereon respectively of the said J. Henley; and that the plaintiff, had fraudulently obtained the signature of the said J. Henley to the said blank bill stamps respectively: and that, the defendant was ready to verify.

Fourthly; as to the second count of the declaration,—except as to so much of the said count as charged, that the defendant

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composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge,—that all the charges in the libel (setting them forth) were made before the Lord Mayor; that the defendant composed and published the said libel without malice; and that the same contained a true and full account of all that which took place before the said Lord Mayor, touching the said charges and complaint, without any suppression, alteration, omission, or misrepresentation whatever; wherefore the defendant composed and published the said libel in the second count mentioned, as he lawfully might, for the cause aforesaid: and that, the defendant was ready to verify.

Fifthly; as to so much of the second count of the declaration, as relat.d to composing and publishing a certain part of the said libel, with intent to injure the plaintiff in his good name, fame, and credit, that is to say, “Police, Mansion House. On Monday, Charles Delegal, Irish provision agent, 39, Clement's Lane, Lombard Street, was charged before the Lord Mayor with having fraudulently obtained the signature of John Henley, a youth under twenty years of age, to two blank stamped bills”—that before the composing and publishing of the said libel, to wit, on Monday, the 26th of October, 1835, the plaintiff was charged before the said Lord Mayor, at the Mansion House, with having fraudulently obtained the signature of the said John Henley, then being a youth under twenty years of age, to two blank stamped bills. And that, the defendant was ready to verify.

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Sixthly; as to the second count of the declaration,—except as to so much of the said count as charged that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody on a criminal charge,—that all the charges in the libel, (setting them forth,) were true; wherefore the defendant did compose and publish the said libel in the second count mentioned, as he lawfully might, for the cause aforesaid; and that, the defendant was ready to verify.

Special demurrer on several grounds, and joinder:

Henderson, in support of the demurrer, objected, first, that the second plea amounted to the general issue of not guilty; and

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he referred to *Cotton v. Browne* (1), *Drummond v. Pigou* (2), and *Smith v. Thomas* (3).

Secondly, that being only a traverse of the want of reasonable cause, averred in the declaration, the plea ought to have concluded to the country : *Trapaud v. Mercer* (4).

Thirdly, that the narration of facts set forth in the plea did not shew a *corpus delicti* ; and,

Fourthly, that the defendant had not averred, that at the time he made the charge before the magistrate he had knowledge of any facts sufficient to make him believe the truth of the charge.

(The judgment of the Court was confined to the last point.)

To the pleas to the second count, he objected, that they did not confess and avoid the libel ; that they were pleaded to a part only, and not to the whole of the libel ; and he referred to *Mountney v. Watton* (5), *Roberts v. Brown* (6), and *Gray v. Pindar* (7) : also, that they denied malice where the law implied it : *Bromage v. Prosser* (8). But the chief objection urged was, that the proceedings being *ex parte* before a magistrate, were not within the privilege allowed to the publication of proceedings in a court of justice : *Duncan v. Thwaites* (9), *M'Gregor v. Thwaites* (10), and *Flint v. Pike* (11). The decision of the Court, however, turned altogether on a point not adverted to by counsel, for which reason the heads only of the argument are presented here.

E. V. Williams, in support of the second plea, contended that it was not necessary the defendant should believe in the guilt of the party at the time of making the charge : it was sufficient if the facts were such as to lead a reasonable man to put the case in a course of criminal enquiry. The practice of Judges at Nisi Prius *to stop the trial of an action for a malicious prosecution, when a reasonable ground appeared, shewed that such must be the law. But here, the plea alleged

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- (1) 42 R. R. 407 (3 Ad. & El. 312).
- (2) 2 Bing. N. C. 114.
- (3) 42 R. R. 617 (2 Bing. N. C. 372).
- (4) 2 Burr. 1022.
- (5) 36 R. R. 709 (2 B. & Ad. 673).

- (6) 38 R. R. 538 (10 Bing. 519).
- (7) 2 Bos. & P. 427.
- (8) 28 R. R. 241 (4 B. & C. 247).
- (9) 3 B. & C. 556.
- (10) 27 R. R. 274 (3 B. & C. 24).
- (11) 28 R. R. 335 (4 B. & C. 473).

that the defendant instituted the proceedings upon reasonable and probable cause: the cause must precede the effect; the facts were alleged in the plea to have taken place in August, and, in the declaration the charge was alleged to have been made in October; that must be taken as an admission of the true time: *Owen v. Waters* (1); and therefore it sufficiently appeared that the defendant knew the facts before making the charge.

To shew that the plea might be pleaded notwithstanding it amounted to the general issue, the following authorities were referred to: 1 Wms. Saund. 180, n. 1, *Pain v. Rochester* (2), *Chambers v. Taylor* (3), *Coxe v. Worrall* (4), 4 Rep. 14 a.

With respect to the fourth plea, he urged that as the declaration charged the libel to have been published with two different intents, 1st, that the defendant intended to cause it to be believed that the plaintiff had been guilty of the offence imputed to him; 2ndly, that he intended to cause it to be believed that the plaintiff had been taken into custody on a criminal charge; and as it would have been unnecessary to prove both intents if there had been no plea but the general issue, *Rex v. Evans* (5), the defendant might properly plead to only one of them.

As to the substance of the plea, he argued that the only exceptions to the general rule on the publication of proceedings in courts of justice according to the principle established by *Curry v. Walter* (6), and *Rex v. Wright* (7), and recognised in *Saunders v. Mills* (8), and **Roberts v. Brown* (9), were to be found in *Rex v. Fisher* (10), *Rex v. Fleet* (11), *Duncan v. Thwaites* (12), *Stiles v. Nokes* (13), *Lewis v. Clement* (14), *Lewis v. Walter* (15), *Saunders v. Mills* (8), *Rex v. Carlile* (16), *Roberts v. Brown* (9), and *Flint v. Pike* (17); and that the present case did not fall within any such exceptions.

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On the fifth plea, he contended that the libel was divisible,

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| (1) 1 M. & W. 91. | (10) 11 R. R. 799 (2 Camp. 563). |
| (2) Cro. Eliz. 871. | (11) 19 R. R. 344 (1 B. & Ald. 379). |
| (3) Cro. Eliz. 900. | (12) 3 B. & C. 556. |
| (4) Cro. Jac. 193. | (13) 7 East, 492. |
| (5) 23 R. R. 754 (3 Stark. 35). | (14) 22 R. R. 530 (3 B. & Ald. 702). |
| (6) 4 R. R. 717 (1 Bos. & P. 525). | (15) 23 R. R. 415 (4 B. & Ald. 605). |
| (7) 4 R. R. 649 (8 T. R. 293). | (16) 22 R. R. 333 (3 B. & Ald. 161). |
| (8) 31 R. R. 394 (6 Bing. 213). | (17) 28 R. R. 335 (4 B. & C. 473). |
| (9) 38 R. R. 538 (10 Bing. 519). | |

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and that the defendant might properly plead to a part, according to the principle of the cases referred to on behalf of the plaintiff.

In support of the sixth plea, he referred to *Fairman v. Ives* (1).

Henderson, in reply, observed that *Pain v. Rochester* afforded only an *obiter dictum* on the point for which it had been cited: *Chambers v. Taylor* was decided on general demurrer; and in *Coxe v. Worrall* the objection was not taken.

Cur. adr. vult.

TINDAL, Ch. J. :

The first count in the declaration is framed in the usual form, for causing and procuring a false and malicious charge to be made against the plaintiff before a magistrate, and proceedings to be taken thereon without any reasonable or probable cause.

The second plea, which is pleaded to that count only, alleges, in terms, that the defendant caused and procured the charge to be made "upon and with a reasonable and probable cause;" and then proceeds to state what that reasonable and probable cause was; and in so *doing, alleges the several facts and circumstances attending the transaction out of which the charge before the Lord Mayor arose. To this plea there is a special demurrer, alleging as one ground of objection, that it contains no allegation, that the defendant at the time he caused the charge to be made, had been informed of, or knew, or in any manner acted on those facts and circumstances. And we are of opinion, that the plea is bad, not in form only, but in substance, on this ground of objection. The gravamen of the declaration is, that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time; and under the plea of not guilty, the plaintiff must have failed at the trial, if he had not proved that the facts of the case had been communicated to him, or at all events so much of the facts as would have been sufficient to induce a belief of the plaintiff's guilt on the mind of any reasonable man, previous to the charge being laid before the magistrate. This was held by the Court of King's Bench in the course of last Term, upon a motion for a new trial in a case of

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(1) 24 R. R. 514 (3 B. & Ald. 642).

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Docwra v. Hilton. And if the defendant instead of relying on the plea of not guilty, elects to bring the facts before the Court in a plea of justification, it is obvious that he must allege as a ground of defence, that which is so important in proof under the plea of not guilty, viz. that the knowledge of certain facts and circumstances which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion. Whereas it is quite consistent with the allegations in this plea, that the charge was made upon some ground altogether independent of the existence of the facts stated in the plea; and that the defendant now endeavours to support the propriety *of the charge, originally without cause, by facts and circumstances which have come to his knowledge for the first time since the charge was made. Upon this ground we hold the second plea to be insufficient in law.

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The second count of the declaration is, for the composing and publishing of a false and malicious libel; the libel consisting of the publication, in a newspaper, of a police report of the same proceedings before the Lord Mayor, which form the subject-matter of the first count. And the fourth and sixth pleas are each pleaded to the second count, "with the exception of so much of the count as charges, that the defendant composed and published the libel therein mentioned, intending to cause it to be believed that the plaintiff had been taken into custody upon a criminal charge." To this plea various objections have been assigned for cause of special demurrer, and have been urged in argument before us. We think, however, an objection appears upon the face of the plea, which renders it unnecessary for us to give any opinion, either upon the formal objections which have been urged against its validity, or on the more general question which has been raised, viz. whether the publishing of a fair and correct account of proceedings, *ex parte*, upon a charge before a magistrate, is or is not a privileged publication. For each of these pleas alleges, as a ground of justification, "that the supposed libel contains a full and true account of all that took place before the Lord Mayor, touching the said charge or

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complaint.” But it is an established principle, upon which the privilege of publishing a report of any judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in Court, and must contain no defamatory observations or comments from any quarter whatever, in addition to what forms strictly and properly the legal *proceedings. The principle is so laid down in the case of *Lewis v. Clement* (1), and in other cases. But in the libel set out in the declaration, after the statement of the evidence given before the Lord Mayor, an observation is inserted of Mr. Hobler, the chief clerk, “that it was exceedingly improper, under any circumstances, to obtain the signature of the complainant, a mere boy, to bills of exchange.” This appears to us to be a substantive reflection on the character and conduct of the plaintiff, which is altogether unwarranted, in two respects ; it was not made in the course of any judicial proceeding, by any one whose duty called upon him to make it ; it was uttered by a person, who, for this purpose, must be considered as an entire stranger ; it is the same as if made by any bystander in the Court. Again, it was not warranted by the facts which were brought in evidence against the plaintiff, which amounted not to a charge of obtaining signatures to blank bills of exchange, but to a charge of obtaining the signature of a young man to two blank pieces of paper which had been stamped with stamps for bills of exchange. The libel, therefore, contains a serious reflection on the character of the plaintiff, which the privilege set up in the fourth plea, supposing it to exist, does not extend to justify ; a reflection, the truth of which is not justified by the facts stated in the sixth plea ; and, on those grounds, we think both these pleas are bad.

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The fifth plea is pleaded to the publication of a certain part of the libel, which is thereby separated and divided from the rest ; namely, that part which states, that the plaintiff was charged before the Lord Mayor with having fraudulently obtained the signature of a youth, under twenty years of age, to two blank stamped bills, with the intent to injure the good name and reputation *of the plaintiff. There can be no doubt but that the publication of the fact, that such an accusation was made against

(1) 22 R. R. 530 (3 B. & Ald. 702).

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the plaintiff, is calculated to injure him in his good name and reputation; and that the defendant is therefore called upon to justify such publication: and the only justifications which the law admits to the publication of an accusation of this nature, are two: first, that the accusation against the plaintiff was founded on facts, which make the charge itself a true charge; and, secondly, that the publication was justified by the occasion; viz. that it is a true, full, and faithful account of proceedings in a court of justice. The plea in question sets up neither of these grounds of defence. It is merely an assertion, that an accusation was made by some third person, reflecting on the character of the plaintiff. Even whilst the *Earl of Northampton's* case (1) was held to be law to its full extent, the repetition of a slander by a third person was no justification, unless the party gave the plaintiff a ground of action against such third person, by naming the original author of the slander at the time; nor, it would seem, unless he averred in his justification, his belief, that the accusation was true; per BAYLEY, J. in *M'Pherson v. Daniels* (2). But the case of *De Crespigny v. Wellesley* (3) furnishes an authority, that this doctrine does not extend to the publication of a written libel; and that where such libel consists in publishing the fact of an accusation having been made against another, the defendant must shew the accusation to be true. The justification in the present case, in fact, amounts to no more than a republication of the libel itself.

If the libel is to be taken as containing a publication of legal proceedings, as might be surmised from the whole of the libel as stated in the declaration, then the plea is bad, because it omits to state that it is a true *and accurate report containing the whole of what passed on that occasion. The terms of the accusation should be stated, not merely the result of it; for if the terms in which it was preferred were stated, it might carry with it its own refutation or explanation. See *Saunders v. Mills* (4), *Flint v. Pike* (5), *Smith v. Thomas* (6): and, still further, it appears on

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(1) 12 Co. Rep. 134.

2 M. & P. 529).

(2) 34 R. R. 397 (10 B. & C. 263).

(5) 28 R. R. 335 (4 B. & C. 473).

(3) 30 R. R. 665 (5 Bing. 392).

(6) 42 R. R. 617 (2 Bing. N. C.

(4) 31 R. R. 394 (6 Bing. 213; 372).

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this very record, that the libel justified is in fact a part of a legal proceeding only, viz. the charge; which the defendant is not justified in publishing alone. (See *Rex v. Lee* (1), *Rex v. Fisher* (2).) We therefore think the fifth plea bad also; and, upon the several pleas above demurred to, we give our

Judgment for the plaintiff.

1836.
May 9.

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ELIZABETH SMITH v. MARGARET KINGSFORD.

(3 Scott, 279—284; S. C. 2 Hodges, 109.)

The plaintiff, a domestic servant, entered into the defendant's service on the 19th November. On the 15th January, her mistress caused her to be taken before a magistrate on a charge of stealing some small articles of plate: the magistrate remanded her till the 20th, when she was again brought up, and discharged. On the 22nd, the plaintiff went to demand her clothes and wages, including 1*l.* 1*s.* in lieu of a month's warning. The defendant tendered 2*l.* 2*s.* for the two months' actual service, but refused to pay the additional guinea: Held, that, inasmuch as the placing the plaintiff in custody on a charge that was afterwards abandoned was no dissolution of the contract of hiring, the plaintiff was under the circumstances entitled to wages for the third month, which had been entered upon; and that the whole might be recovered under the common count for work and labour.

INDEBITATUS ASSUMPSIT for work and labour, and for money due upon an account stated. Pleas: first, *non assumpsit*, as to all but 2*l.* 2*s.*; secondly, as to the said sum of 2*l.* 2*s.*, a tender of that sum; which was brought into Court, and taken out by the plaintiff; thirdly, as to the sum of 1*l.* 1*s.*, parcel &c., that, before and at the time of her dismissal and discharge thereafter mentioned, the plaintiff was in the defendant's service in the capacity of a cook, at the yearly wages of 12*l.* 12*s.*; that therefore, and during the first year of such service, and before such dismissal and discharge as aforesaid, to wit, on the 14th January, 1836, the plaintiff conducted *herself improperly as such domestic servant, in this, to wit, that the plaintiff, without the defendant's knowledge or consent, and against her will, wrongfully introduced into the defendant's dwelling-house, in which the plaintiff was employed, two men and one woman whose names and persons were unknown to the defendant, and

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(1) 5 Esp. 123.

(2) 11 R. R. 799 (2 Camp. 563).

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harboured and entertained such persons, and then wrongfully kept and harboured the said persons during unreasonable hours, to wit, from eight o'clock in the evening until one o'clock the following morning, without the defendant's knowledge or consent; and that, during the said time the said persons were so in the said house, twenty-nine silver tea-spoons, of the value of 10*l.*, of the defendant, were in that part of the house where the said persons were, and it was then the duty of the plaintiff to take due care of the same and prevent the same from being lost or purloined; yet the plaintiff, during the time the said persons were in the said house as aforesaid, conducted herself so negligently and improperly, that, on the night aforesaid, six of the said spoons were feloniously and unlawfully taken from the said house, and were lost to the defendant, by reason of such misconduct as aforesaid; and the plaintiff, during the time of her being in such service, behaved and conducted herself in an improper and negligent manner: wherefore the defendant, after the said loss of the said spoons had been discovered, and before the expiration of the first year of such service, and before such first year's wages became due, dismissed and discharged the plaintiff from such service as aforesaid: and the defendant further said that the said sum of 1*l.* 1*s.* was and is a sum due from the defendant to the plaintiff in respect of wages for a portion of the said first year, and which accrued after such dismissal and discharge, and not otherwise; and that the plaintiff, from such dismissal, hath continued discharged from the service of the defendant.

The plaintiff joined issue on the first and second pleas, *and to the last replied that the defendant of her own wrong, and without the cause by her in her said last plea alleged, dismissed and wholly discharged the plaintiff from her said service, and from the said dwelling-house.

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At the trial before the under-sheriff of Middlesex, the following facts appeared in evidence: The plaintiff entered into the service of the defendant on the 19th November, 1835, in the capacity of cook, at yearly wages of 12*l.* 12*s.* On the evening of the 14th January, 1836, without the knowledge of her mistress, the plaintiff, at her mistress's expense, entertained two men and a woman. On the following morning, six silver

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tea-spoons belonging to the defendant were missed, and, in consequence of what had occurred on the previous evening, the plaintiff was suspected of having stolen them or been accessory to the theft, and was taken before a magistrate, who remanded her for a further examination. After being detained in the house of correction for five days, the plaintiff was (on the 20th January) again brought up and discharged. The plaintiff on the 22nd demanded of the defendant 2*l.* 2*s.* for two months' wages, and 1*l.* 1*s.* in lieu of a month's warning: the defendant tendered the 2*l.* 2*s.*, but refused to accede to the latter demand; whereupon the plaintiff brought this action. The plaintiff's clothes were taken away by her on the 22nd January.

On the part of the defendant it was contended that she was under the circumstances justified in dismissing the plaintiff without warning; and that the common count for work and labour was insufficient to cover the plaintiff's claim for the period during which no service had been performed: *Archard v. Horner* (1), where it was ruled by Lord TENTERDEN, that, if the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to have been for an entire year; and that he cannot, on the

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*common count for wages, recover for any further period than that during which he had served.

A verdict having been found for the defendant on the issue on the second plea, and for the plaintiff on the first and third, damages 1*l.* 1*s.*,

C. Jones, on a former day in this Term (pursuant to leave), obtained a rule *nisi* that the general verdict might be entered for the defendant, or that a new trial might be had.

Byles shewed cause:

It stands admitted upon the record that the plaintiff entered the defendant's service under a yearly hiring; and it appeared from the evidence that the service commenced on the 19th November, 1835, and was not finally interrupted until the

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22nd January, 1836—for, the placing her in custody under a charge that was afterwards abandoned, was not a dissolution of the contract of hiring. Although, therefore, it is true, that, where the plaintiff claims a compensation for constructive work and labour only, the common count is inapplicable, but, there being no actual service, the declaration must be special: yet here, inasmuch as there has been an actual service for three or four days of the third month, the whole may be recovered under the common count. If it were otherwise, a servant who is absent for a short period on account of sickness, or having a holiday, would be disabled from recovering wages on the common count, by reason of this partial interruption of the actual service. In *Gandall v. Pontigny* (1), A., being employed by B. as a clerk at a salary of 200*l.* per annum, payable quarterly, was discharged in the middle of a quarter, and paid proportionably; and Lord ELLENBOROUGH held that he was entitled to recover his salary for the remainder of the quarter under the general count for work and labour. That case was recognised and acted upon by this Court in **Collins v. Price* (2). There, the plaintiff kept a day school at which the defendant's daughter was the only boarder. At the end of the first quarter the plaintiff's charge for schooling was sent to the defendant and discharged. Four days after the commencement of the second quarter, the child was taken ill and sent home, and did not return to school again. It was held that the defendant was liable for the whole quarter, although there was no express contract for a quarter's notice previously to the removal of the child. And PARK, J., commenting upon *Gandall v. Pontigny*, says: "It was contended for the defendant that the plaintiff was not entitled to recover on the general count for work and labour, since none had been performed subsequently to the period of the discharge, and that, up to that time, the plaintiff had been paid, and the case of *Hulle v. Heightman* (3), was cited, and it was urged that the plaintiff ought to have declared specially on the contract: but Lord

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(1) 1 Stark. 198; 4 Camp. 375.

(4) Bing. 309; 12 Moore, 552; 2

(2) 30 R. R. 542 (5 Bing. 132;

C. & P. 607).

2 Moore & Payne, 233). And see

(3) 2 East, 145.

Beeston v. Collyer, 29 R. R. 576

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ELLENBOROUGH said, 'If he has done work for any part of the quarter, it is done for the whole. This is an objection of a strict nature, and since no dissolution of the contract has been proved, the plaintiff is entitled to recover for the remainder of the quarter.' That appears to us to be expressly applicable to this case."

C. Jones, in support of his rule :

After the 15th January there was no service either actual or constructive: the placing the plaintiff in custody on a charge of stealing was the strongest possible mode of putting an end to the relation of mistress and servant. The cases cited on the other side suppose the absence of misconduct in the servant, and no reasonable ground of dismissal.

[*284] (BOSANQUET, J. : The finding of the jury in this case negatives the *charge of misconduct: the dissolution of the contract must be assented to by both parties.)

The conduct of the plaintiff sufficiently shews her assent to the determination of the contract: she was discharged from custody on the 20th January, and did not return to the defendant's house until the 22nd. *Archard v. Horner* is a distinct authority to shew that the form of declaring adopted in this case is improper.

TINDAL, Ch. J. :

It appears to me that the mere causing the plaintiff to be sent to prison upon a charge that was subsequently abandoned, was not a dissolution of the contract of hiring. However little in degree the relation of mistress and servant between these parties may have been, still I think the plaintiff entitled to recover for the month.

PARK, J., concurred.

BOSANQUET, J. :

I am also of opinion that the contract in this case was not put an end to until the third month's service had been entered upon. The sending the plaintiff to prison was no more a putting an end to the contract than locking her up in a room of the house would have been.

Rule discharged.

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The first of these is the fact that the
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